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No.

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has previously addressed issues relating to defendants' due process right to fair notice of the *amount* of punitive damages that may be assessed. This case presents a different and even more fundamental question of procedural due process that this Court has never squarely resolved: the fair notice to which citizens are entitled so they can tailor their conduct to comply with the law and thereby avoid *liability* for punitive damages altogether.

The question presented is:

Whether state law as applied deprives defendants of fair notice if it permits the imposition of punitive damages for conduct that reasonable persons could have concluded was lawful.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The plaintiffs in this case are Benetta Buell-Wilson and Barry Wilson. The defendants are Ford Motor Company and Drew Ford.

Ford Motor Company has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ford Motor Company ("Ford") respectfully petitions this Court for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS AND ORDERS BELOW

The court of appeal's opinion (Petitioner's Appendix ("App.") 1a–119a) is reported at 73 Cal. Rptr. 3d 277 (2008).

JURISDICTION

The court of appeal entered its judgment on April 10, 2008. The California Supreme Court granted Ford's timely petition for review on July 9, 2008, and suspended briefing pending this Court's decision in *Philip Morris USA v. Williams*, 129 S. Ct. 1436 (2009). The California Supreme Court dismissed review on April 22, 2009. On June 18, 2009, Circuit Justice Kennedy extended the time for filing a petition for a writ of certiorari to September 4, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST., amend. XIV, § 1. California's punitive damages statute, Civil Code Section 3294, is reproduced in the Appendix. *See* App. 224a-225a.

STATEMENT OF THE CASE

This Court has held that "[e]lementary notions of fairness enshrined in our constitutional jurispru-

dence dictate that a person receive fair notice" of *both* "the conduct that will subject him to punishment" *and* "the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). This Court's recent punitive damages jurisprudence has focused on the second part of the fair notice requirement, recognizing the due process limits on the *amount* of punitive damage awards, ensuring that citizens "can look ahead with some ability to know what the stakes are in choosing one course of action or another." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2627 (2008).

This petition, by contrast, implicates an even more fundamental issue of due process: the fair notice to which all citizens are entitled under the Due Process Clause so that they can tailor their conduct to comply with the law and avoid punishment altogether. This is purely a question of *procedural* due process. It is a question with historical roots that reach back more than a century, yet is one that arises time and again in punitive damage cases today. As Justice Scalia recently observed in an analogous context, "[i]t is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail." *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari).

Massive awards of punitive damages implicate this fundamental due process requirement. This Court's decisions establish that a statute, although not unconstitutionally vague on its face, may nevertheless be unconstitutionally vague *as applied* if it permits punishment for conduct that reasonable people could conclude was lawful. In analogous contexts, this Court has referred to such conduct as "objectively reasonable." Some courts faithfully apply these principles when reviewing as-applied vagueness challenges in the context of punitive damages

awards. Other courts, however, effectively refuse to entertain as-applied vagueness challenges to facially valid punitive damages statutes or permit punitive damages to be imposed for conduct that is objectively reasonable.

This case provides the Court with an ideal opportunity to resolve these conflicts. Although the $55 million punishment here is severe and unprecedented, the California Court of Appeal, following established California precedent, effectively refused to entertain Ford's as-applied vagueness challenge because a 1981 decision had found California's punitive damages statute to be facially valid. The court held, moreover, that punitive damages could be awarded under state law even for conduct that reasonable people could conclude was lawful. The result is that Ford and other product manufacturers in California (and in other states following the same misguided approach) are routinely exposed to massive punitive damage awards without regard to whether they had notice sufficient to allow them to comply with the law and avoid punishment.

1. In January 2002, respondent Benetta Buell-Wilson was driving her four-door 1997 Ford Explorer at freeway speed. App. 7a. She swerved suddenly to avoid a metal object that flew off a motor home in front of her. *Id.* Her vehicle rolled over 4½ times and came to rest upside down. *Id.* She suffered a severe spinal cord injury that rendered her paraplegic. *Id.* at 8a. She and her husband commenced a civil action, alleging that their Explorer was "dangerously unstable and prone to rollover due to its overly narrow track width and high center of gravity" and that the roof was "inadequately supported and defectively weak." *Id.* at 11a.

Respondents argued that punitive damages were justified because Ford supposedly knew that the Ex-

plorer's design posed unreasonable risks. Ford, however, showed that the Explorer's roof satisfied Federal Motor Vehicle Safety Standard 216, 49 C.F.R. § 571.216, the standard governing roof strength. RT5145, 5179. Ford also introduced scientific studies establishing that increasing roof strength does not result in a reduction of injuries, because rollover injuries typically occur when the vehicle occupant is thrown into the roof prior to any "crush" occurring. RT5151-5168. Further, Ford showed that the rollover stability standards proposed by Respondents' experts had been considered and rejected by the National Highway Traffic Safety Administration ("NHTSA"), the federal agency responsible for regulating motor vehicle safety. RT3261-3262. Finally, Ford offered to show that the Explorer was among the safest SUVs with respect to rollover accidents, but this evidence was excluded by the trial court. AA26-37, 278-282.

Over Ford's due process and state law objections, RT8128-8136, 8433-8438, 8451-8456, 8461-8462, 8475-8488, 8496-8500, the trial court gave California's standard jury instructions on punitive damages based on Cal. Civ. Code § 3294. App. 80a-81a. California Civil Code section 3294 provides, and the jury was instructed, that punitive damages may be imposed on a defendant who is "guilty of oppression, fraud, or malice." "Malice" — the provision under which Respondents sought punitive damages — was defined for the jury as "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." RT8576. The court rejected Ford's proposed additional instruction that would have told the jury that punitive damages could not be imposed to punish objectively reasonable conduct: "You may not award punitive damages if reasonable people could disagree

about whether Ford's conduct was correct or lawful." *See* Proposed Special Jury Instr. No. 15.

Before this trial, eleven Ford Explorer cases involving similar stability claims had gone to judgment, and in all eleven cases judgment was entered in favor of Ford. AA1154-1235. Several of these cases involved alleged roof defects as well. But in this case, the jury found the Explorer had stability and roof design defects, that Ford failed to warn about the roof, and that these were substantial factors in causing Mrs. Buell-Wilson's injuries. App. 79a-83a. The jury awarded $105 million for non-economic loss — five times more than requested — and it awarded Mr. Wilson $13 million for loss of consortium. *Id.* at 4a, 33a-34a, 41a-42a. The jury also found by a 9-3 vote that Ford acted with "malice" warranting punitive damages, and it imposed $246 million in punitive damages — twice the amount Respondents sought. *Id.*

Ford moved for JNOV as to punitive damages on the ground that California's punitive damages statute would be unconstitutionally vague as applied if it permitted an award of punitive damages against Ford in a context where Ford's conduct was, *ex ante*, objectively reasonable. JNOV Mot. at 19 ("[T]his is a case where different people acting in good faith could look at the same underlying facts available to Ford at relevant time periods and reach different conclusions about whether those facts suggested Ford's conduct was unreasonable or its product defective. If section 3294 permits a jury to punish Ford under these facts, then its application is unconstitutional . . . ."). The trial court rejected the vagueness challenge, App. 194a-195a, but held the damages excessive. It reduced Mrs. Buell-Wilson's compensatory damages award to $70 million, Mr. Wilson's loss of consortium award to $5 million, and the punitive damages to $75 million. App. 197a.

2. On appeal, Ford again argued that if California law permitted Ford to be punished in this case, then the California standard for awarding punitive damages was unconstitutionally vague as applied. Ford Br. at 56 ("If California law would allow punishment on this record, then the law is unconstitutionally vague as applied."). The court of appeal rejected this argument based on its prior holding in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981). The court's complete constitutional analysis was as follows:

> Ford contends that if punitive damages can be awarded on this record, Civil Code section 3294 is unconstitutionally vague because it failed to give Ford fair notice that its conduct could subject it to punitive damages. This contention is unavailing.
>
> Ford made just this argument over 25 years ago in *Grimshaw*. The Court of Appeal rejected it, concluding that "punitive damages are recoverable in a nondeliberate or unintentional tort where the defendant's conduct constitutes a conscious disregard of the probability of injury to others."

App. 61a-62a (citation omitted).

In upholding liability for punitive damages, the court of appeal specifically rejected Ford's argument that California state law did not permit an award of punitive damages based on conduct that was objectively reasonable, *i.e.*, conduct that reasonable persons could believe was lawful. App. 56a. The court also held that "compliance with industry standards or custom was irrelevant . . . to the issue of punitive damages." App. 28a. Nor did the court give any significant weight to the judgments made by NHTSA,

reasoning that "'[g]overnmental safety standards . . . have failed to provide adequate consumer protection against the manufacture and distribution of defective products.'" *Id.* at 57a (quoting *Grimshaw*, 119 Cal. App. 3d at 810).

Finally, although the court found "compelling evidence" that the jury was acting out of "passion or prejudice" and was not a "fair and neutral trier of fact" in assessing damages, App. 42a, it held that these defects could be cured by remitting the compensatory damages to $27.6 million and the punitive damages to $55 million — still the largest punitive damages award affirmed on appeal in California history. App. 5a-6a.

3. Ford sought review in the California Supreme Court, again raising its as-applied vagueness challenge. Pet. for Review at 4 ("[T]he court [of appeal] held that juries are authorized to deem a manufacturer's design decisions malicious, and impose severe punishment, even where undisputed, objective indicators — such as ongoing genuine debate in the engineering community, accident data showing the product is among the safest in its class, and governmental regulatory decisions confirming the manufacturer's judgment — affirmatively refute malice as a matter of law. This ruling contradicts . . . due process."); *id.* at 32 n.5 ("Review is also needed because the Court of Appeal's interpretation of section 3294 renders it unconstitutionally vague as applied in this case . . . ."). The court denied review, and Ford filed a petition for a writ of certiorari in this Court. Ford asked this Court to review the court of appeal's rejection of Ford's as-applied vagueness challenge, as well as its rulings that permitted punitive damages to be assessed against Ford for harm to non-parties. Cert. Pet. at 9. The Court granted Ford's petition, vacated the judgment of the court of appeal, and remanded for further consideration in light of *Philip Morris*

USA v. Williams, 549 U.S. 346 (2007). *See* 550 U.S. 931 (2007) (GVR order).

On remand, Ford once again raised its as-applied vagueness challenge in the court of appeal. Ford Br. at 33. While the court modified its earlier opinion to reject Ford's argument that it was subject to potential punishment for harm to non-parties, it otherwise reinstated its prior opinion, including its rejection of the as-applied vagueness challenge. App. 61a-62a.

4. Ford petitioned for review in the California Supreme Court, presenting its vagueness challenge again. Pet. for Review at 35. The California Supreme Court initially granted review and deferred a decision pending this Court's ruling in *Philip Morris v. Williams* (*Williams II*). When this Court dismissed the writ in *Williams II* as improvidently granted, 129 S. Ct. 1436 (2009), the California Supreme Court denied review. App. 120a.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly warned of the dangers that arise when States permit civil juries to punish defendants based on vague standards, and has insisted on strict procedural safeguards to protect a defendant's due process right to fair notice. In *Williams*, the Court explained that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice'" and "may threaten 'arbitrary punishments,' *i.e.*, punishments that reflect not an 'application of law' but a decisionmaker's caprice." 549 U.S. at 352 (citation omitted).

This Court has never suggested that these concerns apply only when the issue is the amount of punitive damages and disappear where the issue is li-

ability for punitive damages. On the contrary, the Court has expressly recognized that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice" of *both* the "conduct that will subject him to punishment [and] . . . the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. Nevertheless, the California Court of Appeal, consistent with a long line of California Supreme Court rulings, effectively refused to consider Ford's argument that fair notice was lacking in this case. Under the California courts' approach, *any* award of punitive damages under California law — no matter how objectively reasonable the underlying conduct of the defendant may be in a particular case — is impervious to an as-applied vagueness challenge because the statute itself is not unconstitutionally vague on its face.

As shown below, California's approach, while misguided, is not unique. This Court should grant review, confirm that the facial validity of a punitive damages statute does not preclude subsequent as-applied challenges, and establish that such as-applied challenges should be sustained if the defendant's conduct in the particular case was objectively reasonable as a matter of law.

THE COURT SHOULD GRANT REVIEW TO RESOLVE CONFLICTS AND CONFUSION OVER AS-APPLIED VAGUENESS CHALLENGES TO PUNITIVE DAMAGES STATUTES.

A. The California Courts, Like Courts Of Other States — But Contrary To Decisions Of This Court And Others — Have Effectively Precluded As-Applied Vagueness Challenges To Punitive Damages Statutes.

A fundamental requirement of due process is the opportunity to know in advance the conduct that will subject a person to punishment so that the person can tailor his or her conduct to comply with the law. Where a statute fails to provide such fair notice with respect to the defendant's conduct, it is unconstitutional as applied even if it can constitutionally be applied to the clearly egregious conduct of other defendants. But California courts will not even entertain a challenge on this basis. The California approach — which rejects all such challenges simply by pointing to the facial validity of the statute — conflicts not only with *Gore* and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), but also with the way this Court resolves as-applied vagueness challenges to statutes generally.

1. The California Court of Appeal resolved Ford's as-applied vagueness challenge by relying solely on its prior decision in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981), which found that the California punitive damages statute was not unconstitutionally vague on its face. But Ford did not challenge the facial validity of that statute in *this* case. Ford argued instead that the statute is unconstitutional as applied in *this* case because Ford's

conduct in *this* case was objectively reasonable as a matter of law. The court of appeal never addressed that argument and, instead, dismissed it as if it were a facial challenge. *See* App. 61a-62a ("Ford made this same argument over 25 years ago in [*Grimshaw*]," and "[t]he Court of Appeal rejected it"); *Grimshaw*, 119 Cal. App. 3d at 811 (rejecting contention that Ford "did not have 'fair warning' that its conduct would render it liable for punitive damages," because of "the long line of decisions in this state . . . holding that punitive damages are recoverable . . . where the defendant's conduct constitutes a conscious disregard of the probability of injury to others").

Grimshaw involved a different vehicle and completely different conduct — and the decision even pre-dated the current version of California's punitive damages statute, App. 57a — yet the court of appeal effectively held that *Grimshaw*'s rejection of a constitutional challenge to a punitive damages award in a different case 28 years ago forever barred future challenges. Indeed, in rejecting Ford's argument, the court deemed even undisputed facts — including the fact that Ford's design complied with federal design standards and industry custom, and the fact that Ford had won the eleven prior trials alleging the same defects in the Explorer — to be utterly irrelevant. The court flatly refused to analyze whether *in this particular case* Ford had notice sufficient to allow it to tailor its conduct to comply with the law.

This misguided approach is consistent with the way the California Supreme Court has instructed the lower courts to resolve vagueness challenges to punitive damage awards under Cal. Civ. Code § 3294. In *Bertero v. National General Corp.*, 13 Cal. 3d 43, 66 n.13 (1974), the court rejected a challenge that § 3294 was unconstitutionally vague by simply observing that an existing body of law "specifically de-

fines when exemplary damages may be awarded" and noting that "on several occasions section 3294 has been held constitutional." Likewise, in *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal. 3d 809, 819 (1979), the court dismissed a vagueness challenge on the ground that the argument that § 3294 was unconstitutional "has been frequently rejected." And in *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402 n.2 (1982), the court rejected yet another vagueness challenge to § 3294 by asserting that "it is not necessary to devote extensive discussion to the question" because "the courts have frequently and uniformly upheld that provision's validity." These decisions effectively preclude California courts from considering as-applied vagueness challenges to California's punitive damages statute.

Other state supreme courts have adopted the same misguided approach and resolve vagueness challenges to punitive damages awards by looking only to the language of the punitive damages statute without regard to whether the defendant in the particular case before it had the fair notice due process requires. *See, e.g.*, *Palmer v. A.H. Robins*, 684 P.2d 187, 214-15 (Colo. 1984); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 46 (Alaska 1979), *overruled on other grounds* by *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985). The North Dakota Supreme Court's analysis in *Stoner v. Nash Finch, Inc.*, is typical of this approach. In that case, the court rejected a vagueness challenge based purely on the text of the statutory terms, without regard to the facts of the case before it:

> We believe that the statutory terms 'oppression, fraud, or malice' have well-established meanings, are sufficiently clear to persons of ordinary intelligence to afford a practical guide to behavior

> and are capable of application in an even-handed manner.

446 N.W.2d 747, 756 (N.D. 1989) (citing *Grimshaw*).

To be sure, the phrase "oppression, fraud or malice" is not unconstitutionally vague on its face, because there is a "hard core" of obviously unlawful conduct to which it clearly applies. *See, e.g.*, *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 495 & n.7 (1982) (outside the First Amendment context, a facial challenge should be sustained only if the language "has no core" and the law is for this reason "impermissibly vague in all of its applications") (emphasis omitted); *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973) (any imprecision in the language of a statute "has little relevance" where defendant's conduct "falls squarely within the 'hard core' of the statute's proscriptions"). For example, in *Angie M. v. Superior Court*, 37 Cal. App. 4th 1217, 1227–29 (1995), the court held that the defendant had fair notice that an intentional tort such as sexual abuse and battery is punishable. But a decision that a statute is not unconstitutionally vague on its face should not forever bar as-applied challenges in other, substantially different contexts where reasonable people could conclude that the defendant's conduct was lawful. *See, e.g.*, *Broadrick*, 413 U.S. at 609 (where the conduct of the defendant is "obviously covered" by a statute, "the statement of Mr. Justice Holmes is particularly appropriate: 'if there is any difficulty . . . it will be time enough to consider it when raised by someone whom it concerns'" (*quoting United States v. Wurzbach*, 280 U.S. 396, 399 (1930))).

2. The approach taken by the California courts, and the other state supreme courts that have followed suit, is erroneous and conflicts with decisions from this and other courts.

"'[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of *the conduct that will subject him to punishment*.'" *State Farm*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574) (emphasis added). This Court has repeatedly "insist[ed] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Punishment therefore may not be based on a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997).[1]

This Court has consistently applied due process vagueness principles to laws imposing civil liability where the liability is punitive in nature. *See, e.g.*, *Hoffman Estates*, 455 U.S. at 499 (employing strict vagueness scrutiny of statute that imposed quasi-

[1] At the time of the Founding, punitive damages were generally imposed in cases where the defendant committed an intentional tort or engaged in conduct that was clearly wrongful. *See, e.g.*, *Tullidge v. Wade*, 95 Eng. Rep. 909 (C.P. 1769) (sexual assault); *Benson v. Frederick*, 97 Eng. Rep. 1130 (K.B. 1766) (Colonel ordered a common man be stripped and receive 20 lashes "merely out of spite" and revenge against another army official). In the modern era, however, punitive damages are permitted on claims that do not require intentional conduct and have been imposed for conduct that is *not* so clearly wrongful that a defendant would necessarily be on notice that engaging in the conduct could subject him to punishment. In fact, as this case illustrates, they are often imposed in cases where reasonable people could conclude that the conduct in question was lawful and appropriate. If a defendant is subject to punishment that reasonable people could conclude was lawful, the defendant cannot know in advance how to conform his conduct to the law and avoid punishment.

criminal penalties); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) ("[T]his state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague"); *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 241 (1932) (holding statute unconstitutionally vague where it was designed not to remedy a violation but "to inflict punishment"); *A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 239 (1925) (holding statute unconstitutionally vague in civil case); *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915) ($6,300 civil penalty violated due process).

In considering as-applied vagueness challenges, this Court has repeatedly held that they must be resolved not simply by pointing to the facial validity of a statute but rather by examining whether the defendant in the particular case had the fair notice due process requires. As the Court explained in *Maynard v. Cartwright*, "[v]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." 486 U.S. 356, 361 (1988); *Hoffman Estates*, 455 U.S. at 494–95 (same); *United States v. Powell*, 423 U.S. 87, 92 (1975) (same); *United States v. Mazurie*, 419 U.S. 544, 553 (1975) ("Given the nature of the [Native American tribe]'s location and surrounding population, the statute was sufficient to advise the [defendants] that their bar was not excepted from tribal regulation by virtue of being located in a non-Indian community.").

The California courts' approach directly conflicts with these decisions. It is inconsistent with *State Farm* and *Gore*, which require an assessment of whether the defendant had fair notice of "the conduct that will subject him to punishment," and it cannot be reconciled with this Court's vagueness jurisprudence, which similarly commands a focus on "the

facts of the case at hand," *Maynard*, 486 U.S. at 361. Under the court of appeal's approach, punitive damage awards in California are forever insulated from as-applied vagueness challenges regardless of the conduct at issue. The consequence is that in jurisdictions that follow the California approach, defendants simply cannot have an as-applied vagueness challenge to a punitive damages statute considered.

The California courts' approach also conflicts with the approach followed by many other courts that *do* examine the particulars of the defendant's conduct to determine whether application of the statute in a particular circumstance is consistent with due process notice requirements. *See, e.g.*, *Arriaga v. Mukasey*, 521 F.3d 219, 224–29 (2d Cir. 2008) (analyzing vagueness challenge by evaluating the defendant's conduct in light of objective standards); *Fuller ex rel. Fuller v. Decatur Pub. Sch. Bd.*, 251 F.3d 662, 667–68 (7th Cir. 2001) (same); *Packer v. Bd. of Educ.*, 717 A.2d 117, 128 (Conn. 1998) ("The general rule is that the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the particular facts at issue.").

In *State v. Scruggs*, 905 A.2d 24 (Conn. 2006), for example, the defendant was prosecuted for placing her son in a situation "likely to injure his mental health." The Connecticut Supreme Court had previously rejected a vagueness challenge to this statute in a case where defendant "forced three young boys to expose themselves and to urinate into a cup," obviously improper conduct which courts had previously found violated the statute. *Scruggs*, 905 A.2d at 33, *discussing State v. Payne*, 695 A.2d 525 (Conn. 1997). But *Scruggs* was different; it involved a defendant who allegedly created a risk of mental injury to her child by maintaining an unhealthy living environment. The court recognized that its prior decision

did not foreclose all vagueness challenges, and explained that its task was to determine if the statutory language provided the defendant "with adequate notice of the line dividing lawful conduct from unlawful conduct *in this context*." *Id.* (emphasis added).

The court held that the defendant did not have adequate notice. The court noted that the state's child services department had investigated the defendant and closed its file, demonstrating that "the only experts in child safety who had knowledge of the conditions in the defendant's home . . . had concluded that they were *not* so deplorable as to pose an immediate threat to [the child's] mental health." *Id.* at 37. It observed that "there is an acceptable range of risk" and that "[n]ot all conduct that poses a risk to the mental or physical health of a child is unlawful." *Id.* (emphasis omitted). Thus, while it may be common knowledge that "a clean and orderly home is preferable to a dirty and cluttered home" — just as it may be common knowledge that "drinking milk is healthier than a constant diet of soft drinks," "large cars are safer than small cars," and "playing computer games is safer than riding a bicycle, and so on" — all of these things "involve virtually infinite gradations of conduct, making it extremely difficult, if not impossible, for an ordinary person to know where the line between potentially harmful but lawful conduct and unlawful conduct lies." *Id.* at 36-37.

If the California Court of Appeal had conducted this type of analysis here, it would have considered the same type of facts and it would have recognized the same type of difficulty in drawing the line between lawful and unlawful conduct. Here, the federal government has been investigating SUV safety for decades; it has never found the Explorer or any SUV to be defective because of the risk of rollover; it has rejected the methods proposed by Respondents' experts in this case for evaluating rollover safety;

and it established specific roof standards with which the Explorer complied.[2]

As the *Scruggs* court recognized, not all risks are unacceptable or unlawful. Cars may be safer than SUVs with respect to rollovers, but SUVs offer advantages that cars do not. Moreover, SUVs provide greater protection than cars in most *other* types of collisions. Thus, it is difficult if not impossible to know when the risk of rollover, when balanced against the benefits of SUVs, becomes too great to be acceptable. David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 37 (1982) ("The very notion of how much design safety is enough . . . involves a morass of conceptual, political, and practical issues on which juries, courts, commentators, and legislatures strongly disagree"); *accord, e.g.*, *Iannacchino v. Ford Motor Co.*, 888 N.E. 2d 879, 888 (Mass. 2008) ("the term 'defect' is conclusory and can be subjective as well").

But the court of appeal considered none of these things in its constitutional analysis. Instead, following the approach mandated by California precedent and utilized by numerous courts in other states, it rejected Ford's vagueness challenge simply because other courts had rejected vagueness challenges in other cases involving different facts. The court ignored altogether the objective factors present *in this case* that would permit reasonable persons to conclude that Ford's conduct was lawful. It simply cannot be the case that all of these factors are irrelevant to an as-applied vagueness challenge, as the Califor-

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[2] Ford is not arguing here for preempting State tort law with respect to liability. The point is simply that federal law allowing certain conduct is highly relevant to any inquiry seeking to determine whether a defendant had fair notice that its conduct would subject it to punishment.

nia court held. Thus, the facts of this case make it an excellent vehicle for this Court to dispel the confusion in the lower courts.

B. The Court Should Clarify The Correct Standard For Resolving As-Applied Vagueness Challenges To Punitive Damages Statutes.

This Court should grant review and clarify the legal standard that courts should apply when deciding as-applied vagueness challenges to punitive damages statutes. In so doing, the Court need not write on a blank slate or develop a new set of guideposts. Rather, the Court can simply apply the same test the Court has historically applied in analogous contexts — whether the defendant's conduct was objectively reasonable.

1. This too is a question that has split the lower courts. In evaluating as-applied vagueness challenges, some courts ask whether reasonable persons could conclude the conduct at issue was unlawful; if so, the challenge fails, even if reasonable persons could also conclude the conduct was lawful. *See, e.g.*, *Barber v. Jefferson County Racing Ass'n*, 960 So. 2d 599, 616 (Ala. 2007); *State v. Thirteenth Dist. Judicial Court*, 208 P.3d 408, 414 (Mont. 2009). Other courts, in contrast, hold that as-applied vagueness challenges fail only where reasonable persons could *not* conclude the conduct was lawful. *See, e.g.*, *Canton Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021, 1029-30 (9th Cir. 2009); *Haggblom v. City of Dillingham*, 191 P.3d 991 (Alaska 2008).

This conflict is illustrated by contrasting the court of appeal's decision in this case with the decisions of the Fifth Circuit in *B & B Insulation, Inc. v. OSHRC*, 583 F.2d 1364 (5th Cir. 1978), and *S & H Riggers & Erectors v. OSHRC*, 659 F.2d 1273 (5th Cir. 1981). *B & B Insulation* involved a $90 fine im-

posed on an employer who failed to require the use of safety belts or lifelines by employees engaged in insulating steam pipes at a lumber company. The $90 fine was not based on any statute or regulation that specifically required use of safety belts or lifelines under these circumstances, but on a general regulation that provided that the employer was responsible for the "wearing of appropriate personal protective equipment in all occupations where there is exposure to hazardous conditions." 583 F.2d at 1368. The Fifth Circuit agreed with the employer that the regulation was "unenforceably vague for failure to provide employers with reasonable notice of what is required." *Id.* at 1367.

The court noted that "this case itself was decided with three different written opinions" and that "[i]f the regulation is such that the commissioners themselves cannot agree upon what it demands, it may seem to require different things to different employers." 583 F.2d at 1369. To avoid this due process problem, the Fifth Circuit interpreted the regulation to require "only those protective measures which the knowledge and experience of the employer's industry, which the employer is presumed to share, would clearly deem appropriate under the circumstances." *Id.* at 1367. The Fifth Circuit vacated the $90 fine because there was no evidence of "customary procedures in the industry." *Id.* at 1372.

S & H Riggers involved the same general OSHA regulation. The court reaffirmed its decision in *B & B Insulation*, observing that the generality of the regulation "mandates that it be applied only in such a manner that an employer may readily determine its requirements by some objective external referent." 659 F.2d at 1280. It was not sufficient, the court determined, that a majority of the Occupational Safety and Health Review Commission were of the opinion that certain safety equipment should be

used if that equipment was not "customarily employed in an industry." *Id.* at 1281. Due process "requires that employers be given more advance notice than this of the requirements of any regulation imposing civil penalties and substantial compliance costs." *Id.* The Fifth Circuit recognized an exception that would permit the government to impose penalties even for conduct that was consistent with industry custom where "the employer has actual knowledge of a hazard requiring the use of personal protective equipment." *Id.* But, the court observed, this standard was not met where the defendant "could reasonably conclude that additional fall protection was not necessary." *Id.* at 1283.

The conflict between these Fifth Circuit opinions and the court of appeal's decision in this case is stark. All three cases involved a general prohibition that did not specifically prohibit the conduct at issue. The Fifth Circuit held that under these circumstances due process ordinarily requires proof of a departure from industry custom and practice; in this case, the court of appeal held that industry custom and practice were irrelevant and that admission of such evidence would be reversible error. The Fifth Circuit held that even a $90 fine could not be imposed for conduct that reasonable people could conclude was lawful; the court of appeal in this case held that a $55 million punitive damage award could be imposed for such conduct.

2. The Fifth Circuit's approach is correct. This Court has long recognized that if reasonable people can disagree about whether particular conduct is prohibited by a statute, the fair notice required by due process is absent. *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 401 (1979) (punishment is improper where "experts can — and do — disagree"); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 395 (1926) (penalties violate due process where they depend upon the

"probably varying impressions of juries"); *Danaher*, 238 U.S. at 491 (a $63,000 penalty violated due process where "the company was well justified in regarding the regulation as reasonable and in acting on that belief").

Due process requires an objective standard for imposing punishment; otherwise, even persons and companies with the best of intentions will simply not know how to conduct their affairs so as to avoid a punitive sanction. For example, in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 68-72 (2007), a case involving the Fair Credit Reporting Act, 15 U.S.C. § 1681m(a), the Court noted that, historically, whether conduct could be deemed "reckless" and therefore punishable was based on objective standards.

The Court explained that "[i]t is this high risk of harm, *objectively assessed*, that is the essence of recklessness at common law." *Id.* at 69 (emphasis added) (citing W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 34, p. 213 (5th ed. 1984)). Although the Court "disagree[d]" with Safeco's analysis of its legal obligations, the Court held that Safeco could not be deemed to have acted "willfully" or with "reckless disregard" because Safeco's analysis, "albeit erroneous, was not *objectively unreasonable*." *Id.* at 68-72 (emphasis added). "Where, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Id.* at 70 n.20. *See also Screws v. United States*, 325 U.S. 91, 97, 103 (1945) (interpreting "willful" to include an objective component in order to avoid constitutional problem); *Aronov v. Napolitano*, 562 F.3d 84, 94 (1st Cir. 2009) (en banc) (defendant's actions were "substantially justified"

"even if a court ultimately determines the [defendant]'s reading of the law was not correct," because the defendant's interpretation was objectively reasonable).

While *Safeco* involved an issue of statutory interpretation and not a due process challenge, the Court's historical understanding bears directly on the due process inquiry. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("Oregon's abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause. As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis.") Moreover, this Court has already recognized that the objective reasonableness of the defendant's conduct provides the touchstone for due process vagueness analysis. *Lanier*, 520 U.S. at 270-71.

In *Lanier*, the Court held that the due process vagueness standard was functionally identical to the qualified immunity standard, which protects public officials from civil liability based on legal obligations that are not "clearly established." *Id.* at 270-71. As the Court observed, the qualified immunity test for public officers is "simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the *same* protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.* (emphasis added).

This Court's opinions establish beyond doubt that public officials are entitled to qualified immunity as long as their conduct is "objectively reasonable" — *i.e.*, as long as reasonable officials could conclude that the conduct at issue was lawful. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (immunity available

if officers act in "objectively reasonable manner"); *accord Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("The relevant question in this case . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's [conduct] to be lawful."). Accordingly, "if officers of reasonable competence could disagree on [the matter at] issue, immunity should be recognized." *Malley*, 475 U.S. at 341. For example, the Court recently held that school officials were immune from liability for an illegal strip search because other courts had reasonably concluded such searches were lawful. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009) ("We think these differences of opinion from our own are substantial enough to require immunity for the school officials in this case.").

3. Thus, numerous decisions of this Court over the last century, in several different contexts, in civil as well as criminal cases, all establish the fundamental principle that the "fair notice" required to accord due process prohibits punishment for conduct that reasonable people could conclude was lawful — conduct which, in the qualified immunity cases, the Court has called "objectively reasonable."[3] Permit-

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[3] The jury's finding that Ford's product was defective, and that Ford's conduct in selling that product was "malicious," does not establish that Ford's conduct was "objectively unreasonable," as this Court has defined that term. Conduct is objectively reasonable if a reasonable person could conclude that that conduct was lawful, even if other reasonable persons could reach the opposite conclusion, as the jury in this case did. *See, e.g.*, *Safeco*, 127 S. Ct. at 2216 n.20; *Redding*, 129 S. Ct. at 2644. The jury in this case was not asked to determine whether reasonable people could conclude that the Explorer was not defective or that Ford's conduct was proper, and evidence relevant to that inquiry was excluded by the trial court. Thus, its findings of "defect" and "malice" are not tantamount to findings that Ford's conduct was objectively unreasonable.

ting punitive damages to be awarded simply because reasonable people can conclude that the conduct is unlawful, without taking into account the reasonableness of an opposing view, exposes individuals and companies to arbitrary punitive damage awards based upon the potentially idiosyncratic whims of individual juries. For example, to say, as the court of appeal did here, that the jury could find malice because "there is substantial evidence that Ford's decision makers knew how to make the Explorer less dangerous, but chose not to because of financial considerations," App. 54a, is to place no limit whatsoever on the jury's discretion to impose punishment. *All* manufacturers sell products to make a profit, *all* products can and do cause injury, and *all* design decisions reflect a balance of risks, costs, and utility.

If the court of appeal's approach is correct, all product manufacturers are subject to punishment for designing and marketing products that reasonable people, expert engineers, and federal regulators could conclude — and in fact have concluded — are reasonably safe and not defective. Under a regime that permits punishment under these circumstances, the only way that product manufacturers could tailor their conduct to avoid punishment would be to cease production of products that might be subject to criticism by other reasonable people with differing views. This, in effect, would mean that manufacturers can avoid punishment only if they stop selling any products with any risk of injury, because litigation ex-

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[Footnote continued from previous page]

To the contrary, the fact that the jury was divided as to *all twenty-three* liability and damages questions (counting subparts) it answered on the verdict form, including six separate votes of 9-3, the minimum authorized for a civil verdict under California law, provides additional evidence that Ford's conduct was objectively reasonable. RT8402-8410.

perts — like Respondents' expert in this case, who advocates standards rejected by the federal government — can be retained to criticize almost any aspect of a product that results in injury. The result of the standard applied by the court of appeal here would be that manufacturers "[e]ngaged in . . . lawful business[es] which Congress had in no way sought to proscribe . . . could not [sell any product with] the confidence that it would not be later found unreasonable" and subject to punishment. *Powell*, 423 U.S. at 93.

The California court effectively determined that the objective basis for Ford's conduct was irrelevant to punitive damages, deprived Ford of the opportunity to defend its conduct against civil punishment by demonstrating the objective factors supporting its decision, and left Ford unable to determine what is necessary to conform its conduct to whatever a future jury might retroactively determine it should have done. This is not due process.

Review by this Court is necessary to ensure that all responsible citizens have fair notice — that is, notice sufficient to enable them to tailor their conduct to the law and avoid punishment. The test for fair notice should be the same test that this Court applied in *Safeco* and that courts throughout the country have been applying for decades when resolving claims for official immunity: whether reasonable people could conclude the defendant's conduct was lawful.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

Court of Appeal, Fourth District, Division 1, California.
Benetta BUELL-WILSON et al.,
v.
FORD MOTOR COMPANY et al., Defendants and Appellants.
Nos. D045154, D045579.

March 10, 2008.
As Modified on Denial of Rehearing April 10, 2008.
Review Granted July 9, 2008.
Review Dismissed, Cause Remanded Apr. 22, 2009.

Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., William E. Thomson, Los Angeles, Eileen M. Ahern and Theodore B. Olson, for Defendants and Appellants.

Arnold & Porter, Ronald C. Redcay, Los Angeles, Murray R. Garnick, Robert A. McCarter; National Chamber Litigation Center, Robin S. Conrad and Amar D. Sarwal, for the Chamber of Commerce of the United States of America as Amicus Curiae on behalf of Defendants and Appellants.

Mayer Brown and Donald M. Falk, Palo Alto, for the Product Liability Advisory Council, Inc., as Amicus Curiae on behalf of Defendants and Appellants.

Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Jerome B. Falk, Jr., Steven L. Mayer, Keith D. Kessler, San Francisco; Schoville & Arnell, Dennis A. Schoville, Louis G. Arnell, San Diego, and James S. Iagmin, for Plaintiffs and Respondents.

NARES, J.

This case is before us for a second time, after a GVR[1] order from the United States Supreme Court directed that we reconsider our original opinion in *Buell-Wilson v. Ford Motor Company* (2006) 141 Cal.App.4th 525, 46 Cal.Rptr.3d 147 (*Buell-Wilson I*) in light of *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (*Philip Morris*). *Philip Morris* holds that upon request, courts must adopt procedures to ensure juries do not punish defendants for harm caused to third parties when determining the amount of punitive damages to award. The Supreme Court also reiterated, however, juries could consider harm to third parties in determining the reprehensibility of a defendant's conduct.

Ford asserts that based on *Philip Morris* it is entitled to a new trial (or at least a further reduction in the punitive damages award) because there is a "significant risk" the punitive damages verdict in this case was based on improper evidence and arguments concerning third party harm. Ford also asserts that we should reconsider our original decision's rejection of its arguments that (1) California's punitive damages statute (Civil Code section 3294) is unconstitutionally vague as applied to this case, and (2) the trial court erred in excluding

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[1] GVR is the acronym used within the Supreme Court for "an order that grants certiorari, vacates the judgment below, and remands the case to the lower court for reconsideration in light of an intervening Supreme Court ruling...." (Stern *et al.*, Supreme Court Practice (8th ed.2002) § 5.12(b), p. 317 (Stern).)

its industry custom and practice evidence. We granted permission to the Chamber of Commerce of the United States of America (the Chamber) and the Product Liability Advisory Council, Inc. (PLAC) to file amicus curiae briefs to support Ford's contentions on remand.

We have reconsidered our decision in *Buell-Wilson I* in light of *Philip Morris*. Based on our analysis of *Philip Morris* and our review of our original decision and the proceedings in the trial court, we conclude *Philip Morris* does not compel a reversal or a further reduction of the punitive damages awarded in this case. Ford has forfeited the right to assert there is a significant risk the punitive damages verdict in this case was based on improper evidence and arguments concerning third party harm because Ford (1) submitted incorrect and misleading jury instructions on third party harm; (2) did not timely object to plaintiffs' closing argument at the punitive damages phase of the trial; (3) did not request a limiting instruction during the liability phase of the trial; and (4) did not raise instructional error as an issue on its original appeal. We also conclude our original decision reduced the punitive damages award to a constitutionally permissible amount that does not punish Ford for harm to third parties. We hold there was no evidence or argument at trial that created a significant risk that the jury, in deciding the amount of punitive damages to award, punished Ford for harm it caused to third parties. Finally, we conclude *Philip Morris* does not require that we change any of the holdings in our original opinion, and thus, with some changes, "we reiterate [our original opinion] in its entirety." (*People v. Velasquez* (1980) 28 Cal.3d 461, 462, 171 Cal.Rptr. 507, 622 P.2d 952.)

INTRODUCTION

Benetta Buell-Wilson (Mrs. Wilson) brought this action against Ford Motor Company (Ford) and Drew Ford (Drew)[2] as a result of the rollover and roof crush of her Ford Explorer (Explorer) that left her a paraplegic. Mrs. Wilson's husband Barry Wilson (Mr. Wilson) brought a claim for loss of consortium against Ford and Drew. A jury found in favor of Mrs. Wilson and Mr. Wilson (together the Wilsons), finding that (1) the Explorer was defectively unstable; (2) the Explorer was not crashworthy due to a defect in the roof; (3) Drew failed to warn the Wilsons that the Explorer was defectively unstable; and (4) Ford and Drew failed to warn the Wilsons of the danger posed by the defect in the roof. The jury awarded Mrs. Wilson $109,606,004 in damages for her injuries, consisting of $4,606,004 in economic damages and $105 million in noneconomic damages, and awarded Mr. Wilson $13 million for his loss of consortium. The jury also found that Ford acted with "oppression, fraud or malice" and awarded the Wilsons $246 million in punitive damages. The court later reduced Mrs. Wilson's total compensatory damages award to $70 million, resulting in an award of $4,606,004 in economic damages and $65,393,996 in noneconomic damages. The court reduced Mr. Wilson's loss of consortium damages to $5 million. The court reduced the punitive damages award to $75 million, a one-to-one ratio to the Wilsons' total reduced award of compensatory damages.

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[2] Ford Motor Company refers to itself and Drew Ford collectively as "Ford," except where necessary to distinguish between the two. Accordingly, we do the same here.

On appeal Ford asserts (1) it is entitled to a new trial because the court erroneously admitted evidence about stability problems with a predecessor vehicle, the Ford Bronco II (Bronco II), and erroneously excluded evidence of the Explorer's "real-world" safety record and comparative data; (2) the noneconomic portion of the compensatory damages award was excessive and an unconstitutional violation of Ford's due process rights; (3) punitive damages were improperly awarded because (a) at most the Wilsons proved that "reasonable people could disagree regarding" the design decisions Ford made, and (b) California's punitive damages law is unconstitutionally vague as applied; and (4) the punitive damages award was excessive and the product of improper considerations. We granted permission to the Chamber, the Alliance of Automobile Manufacturers (AAM) and the PLAC to file amicus curiae briefs to support Ford's contentions on appeal.[3]

We hold that (1) the award of noneconomic damages to Mrs. Wilson, as reduced by the trial court, is excessive under California law, is the product of "passion or prejudice," and must be reduced to $18 million; (2) the reduced award for loss of consortium in the amount of $5 million is reasonable and is affirmed; and (3) the award of punitive damages is excessive, violates federal due process limitations, and must be reduced to $55

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[3] Ford separately appealed the underlying judgment and the court's rulings on posttrial motions. On January 26, 2005, by stipulation of the parties, these two appeals were ordered consolidated.

million, a ratio of approximately two to one to the total compensatory damage award, after our reduction, of $27,606,004 ($4,606,004 in economic damages + $18 million in noneconomic damages + $5 million for loss of consortium). We issue a remittitur conditioning affirmance of the judgment on the Wilsons' agreement to those reductions. Thus, if the Wilsons accept the remittitur, the total judgment will be reduced to $82,606,004 ($4,606,004 in economic damages + $18 million in noneconomic damages + $5 million in loss of consortium + $55 million in punitive damages). We reject the remainder of the arguments made by Ford and amici curiae.[4]

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Accident*

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[4] The Wilsons also appealed the judgment, but have voluntarily dismissed their appeal. Following briefing in this matter, the Wilsons filed a motion to strike allegedly false statements made in Ford's reply brief. We ordered the motion considered concurrently with the appeal. We deny the motion to strike, but note that in resolving this appeal we have not considered any statements that are not supported by the record. The Wilsons filed a motion for judicial notice, requesting that we take judicial notice of the legislative history of the 1987 amendment to Civil Code section 3294, as well as portions of the legislative histories for unenacted Assembly Bill No. 2880, unenacted Assembly Bill No. 2582, and unenacted Senate Bill No. 1429. The Wilsons also filed a motion for judicial notice requesting that we take judicial notice of a letter Ford filed in the United States Court of Appeals for the Ninth Circuit. We grant these requests.

At around 5:00 p.m. on January 19, 2002, Mrs. Wilson, a married 46-year-old graduate student and mother of two, was driving her 1997 four-door Explorer within the speed limit on Interstate 8 near Alpine, California. The road was dry and sloped slightly downhill.

Suddenly, Mrs. Wilson saw what appeared to be a metal object break loose from a motor home in front of her and bounce directly toward her windshield. As she swerved to avoid the object, the wheels on the passenger side lifted from the road, and the Explorer went out of control. The vehicle fishtailed multiple times across lanes and rolled four and a half times, coming to rest on its roof on the road's shoulder. Ford conceded at trial that Mrs. Wilson bore no fault for the accident.

As the Explorer rolled, its roof's pillars and rails crumpled, and the roof crushed down more than 10 inches, causing severe injuries to Mrs. Wilson. Inside the vehicle, she hung upside down from her seatbelt, in "crushing ... unbelievable pain," gasping for breath and feeling as if her life were fading away. Motorists stopped to assist and struggled to flip the vehicle, and rescue crews cut the roof open to remove her. An ambulance took her from the scene to a life flight helicopter, which flew her to Sharp Memorial Hospital (Sharp) trauma center.

B. *Mrs. Wilson's Injuries*

1. *Physical injuries*

The compressive forces from the collapsing roof fractured and severed Mrs. Wilson's spine at the T12 level, where the thoracic and lumbar regions meet. She will never recover sensation or function below the level of that injury. She also suffered facial

injuries, fractured ribs, a cut spleen that caused internal bleeding, a fractured leg and torn PCL and ACL ligaments in both knees, causing bilateral *knee dislocations*.

In addition to the *vertebral fractures*, the spinal sac was damaged, causing leaking of cerebral spinal fluid, and portions of the spinal cord and nerve root were pulverized. Doctors inserted metal screws and rods into her back to stabilize her upper body. After almost two weeks, she was transferred to Sharp's rehabilitation center, where she spent another two and a half months.

Mrs. Wilson's resulting *paraplegia* ended her active life and forced her to painfully relearn basic aspects of daily living, some of which she will never regain. She lives in severe and constant pain that will increase over time. Her accident left her with no sensation from the waist down, except "phantom pain"-a constant burning sensation below her ribs. Above her waist, she suffers constant pain, feels painful pressure on her ribs from the rods in her back, and has intermittent spasms of stabbing pain.

Medication can provide temporary pain relief, but the strong medication needed has serious side effects. It causes her to lose alertness, which makes it impossible to drive. It interferes with her ability to communicate socially. It makes her unsteady in her wheelchair. She also runs the risk of becoming addicted to the medication. There is a constant conflict between efforts to reduce her pain and the debilitating side effects of the medicine itself.

The spinal injury caused a total loss of bladder and bowel control. She must now catheterize herself multiple times daily. Her feces must be manually

extracted. In addition to the emotional pain and humiliation from losing control over her bodily functions, she suffers recurring urinary tract infections, which expose her to a potentially fatal kidney disease. Mrs. Wilson is allergic to commonly prescribed medications, including sulfa and penicillin, and her chronic use of antibiotics to fight infections has caused resistance to other drugs.

Mrs. Wilson also suffers severe bruising, which takes months to heal due to diminished circulation in her lower body. Her feet swell and are susceptible to cracking and bleeding. The constant grinding of her shoulder joints from wheeling her wheelchair has caused shoulder problems, which will worsen over time. She suffers disfigurement, with one leg smaller than the other and large surgical scars across her back.

2. *Mental and emotional injuries*

Before the accident, Mrs. Wilson was an active, athletic, outdoors woman, with a black belt in martial arts. She often camped and hiked with her family, backpacked with Girl and Boy Scouts, helped with the San Diego Tracking Team, and did projects at Mission Trails Regional Park. She and her husband took dancing lessons, traveled and took walks.

She no longer can engage in any of the active lifestyle she once enjoyed, including swimming, skiing, snowboarding, dancing, backpacking and walking. Mrs. Wilson was finishing her masters degree in education and was about to start a second career as a teacher. These plans also have been indefinitely delayed and it is unclear whether they are now possible.

Mrs. Wilson is unable to visit all the rooms in her home-including her own bedroom-because they are inaccessible to her. She and Mr. Wilson must sleep in their laundry room.

She has changed from a giving, enthusiastic, independent person who took joy in aiding others, to being dependent on others for almost every aspect of her life. Her husband and children are now her caregivers.

C. *Mr. Wilson's Loss of Consortium*

The injuries to his wife dramatically changed Mr. Wilson's life as well. The Wilsons no longer share the physical relationship they had prior to the accident. Instead, he is now her caregiver and must assist her with the most personal of care, including showering and catheterizing her. He assists her in transferring in and out of her wheelchair and worries that she may fall if she tries to transfer on her own. Several times per night, he wakes to turn his wife over in bed so that she will not get *bedsores*.

Mr. Wilson has had to decrease his work schedule as an attorney to assist his wife during the day and accompany her to medical appointments and therapy. He performs the household work that his wife can no longer do. The Wilsons spend most of their time trying to accomplish the mundane chores of daily life. Every day Mr. Wilson shares his wife's constant pain, frustration and anxiety in living with her injuries.

D. *The Explorer's Defects*

The Wilsons submitted evidence at trial that the accident and resulting injuries were caused by two independent defects in the 1997 Explorer. They established that the Explorer's design was

dangerously unstable and prone to rollover due to its overly narrow track width and high center of gravity. They also established that the Explorer's roof was inadequately supported and defectively weak, so that it readily crushed into the passenger compartment when subjected to the forces inherent in a foreseeable rollover.

Ford has not challenged on appeal the sufficiency of the evidence supporting the jury's finding that the Explorer was defective on either of these grounds.[5] We therefore review the evidence in the light most favorable to the judgment, disregarding contrary evidence submitted by Ford. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, 68 Cal.Rptr.2d 758, 946 P.2d 427.)

1. *Stability defects*

Long before the Wilsons purchased their Explorer, Ford's engineers knew that the vehicle's design was unstable and prone to rollover in emergency maneuvers due to its high center of gravity and narrow track width. Ford had known for decades the importance of vehicle stability in emergency maneuvers. It knew that on flat, dry pavement, a car or truck should slide out, rather than roll.

The Explorer was derived from the Bronco II and evidence of its development history was presented to

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[5] Ford does assert that the court erroneously admitted evidence that supported the jury's finding on liability and erroneously excluded evidence that supported its defense. However, as is discussed, *post*, those evidentiary rulings were not an abuse of discretion.

the jury to show it how and why the Explorer's instability defect came to exist. In 1981, two years before the Bronco II's introduction, Ford measured the stability index (SI) of its competitor, the Jeep CJ7, which had a widely reported rollover problem. The SI is the average of front and rear track width, divided by the center of gravity height. The higher the SI rating (i.e., the wider the track and lower the center of gravity), the more stable the vehicle. The Jeep's SI was 2.04. The Bronco II's SI was less, measuring 1.86. The Bronco II was so unstable it would roll over at only 30 mph on Ford's test track. Ford engineers proposed improving its stability index by widening its track width. Because doing so would have delayed the vehicle's release date and impacted profits, that proposal was rejected by management.

Ford knew that people were being seriously injured in Bronco II rollovers when the Explorer was being developed. In April 1989, a year before the Explorer release date, Ford executives objected to and tried to stop the release of a damaging Consumer Reports article on Bronco II instability.

Regarding these efforts, Jerry L. Sloan of Ford's public affairs office wrote:

> "We think going in we were in deep trouble regarding our rollover rates.... [¶] ... Our rollover rate is three times higher than the Chevy S10 Blazer.... [T]he [Fatality Analysis Reporting System (FARS)] data put us in a bad light.... [¶] ... [¶] We think, however, that we have clouded their minds...."

Instead of making design improvements in stability for the Explorer, Ford utilized the Bronco II

platform. The Explorer had almost exactly the same track width, high engine mount and elevated center of gravity as the Bronco II, which caused the same instability problems. Over half the parts for the four-door and 80 percent for the two-door Explorer were carried over from the Bronco II.

Ford's design engineers repeatedly requested Ford to widen the track width and lower the center of gravity on the Explorer to increase its stability. However, management declined to do so. As acknowledged by Robert Simpson, a program manager for the development of the Explorer, this was because of "the ... investment that Ford had sunk into the Explorer," and, as the Wilsons' expert, Dr. David Renfroe, explained, it was also because its "directive was to meet Job 1 [the release date]." Dr. Renfroe also explained that "the engineers were proposing to make [stability index] changes to be consistent with their standards and they were prevented from doing that by the management."

Unable to pass the Consumers Union on-track stability test because the Explorer was rolling over at under 45 miles per hour, Ford resorted to using computer simulations to show the vehicle's safety. Ford claimed the validation data for its computer results did not exist, precluding an expert from determining whether the Explorer actually passed the computer tests. The Explorer did pass the Consumers Union short-course test, but that test was designed to measure its handling, not stability.

The Explorer's instability was increased by Ford management's decision to utilize P235 tires that further raised the center of gravity, instead of the P215 tires specified and requested by its engineers to provide greater stability. Based on his review of Ford

internal documents, the Wilsons' expert, Dr. Renfroe, testified that Ford "knew when they made that decision that the vehicle was going to be more unstable and more likely to rollover in an accident avoidance maneuver, and they were ... willing to accept the risk and take it to court, if necessary." Ford chose larger tires to fill a cosmetic gap between the wheel well and tire in order to present a more "robust" look. Ford's own analysis showed that Explorers equipped with P235 tires would have an SI of 2.08, less than the then-current 1987 Bronco II's SI of 2.15. With the P235 tires, the Explorer failed basic J-turn stability tests.

In 1988 a Firestone engineer, who was working with Ford to analyze the stability effect of different tire sizes on the prototype Explorer, wrote to Ford complaining about the vehicle's inherent instability: "Most importantly, the vehicle still has [two-]wheel lift no matter what tire is on it, 225/70, 215/75 or 205/75. So you're kidding yourself if anyone thinks going back to a base tire of 215/75 is going to solve anything."

Unable to pass stability tests with P235 tires, Ford executives in 1989 considered releasing the four-door Explorer on P225 tires in order to pass the Consumers Union test. Later, if the Explorer passed the test, Ford could release the vehicles with P235 tires, consistent with its marketing plan. In an internal Ford email, this was referred to as a "strawman" that would "assure good performance in the [Consumers Union] Test and minimize any adverse Public Relations risk." Ford's decision to accept the risk of using the P235 tires is shown in an internal e-mail from Ford employee Roger Stornant

to Charles White, a senior design engineer for the Explorer:

> "OGC [the office of general counsel] is concerned we will be the only OEM [original equipment manufacturer] with a vehicle that has a significant chance of failing the CU [Consumers Union] test. I believe that management is aware of the potential risk w/P235 tires and has accepted risk."

Instead of using smaller tires, Ford executives decided in February 1989 to underinflate the P235 and P245 tires to 26 pounds per square inch (psi), as opposed to the tire's specification of 35 psi. Explorer owners were not informed of the need to underinflate the tires, nor were they told they were exposed to the risk of a rollover by complying with the tire's higher inflation specifications.

Ford had an opportunity to improve the Explorer's stability when it changed its suspension design for the 1995-1998 models. But again financial considerations prevailed and, according to a 1990 internal Ford document, Ford decided "not [to] take advantage of the fact that the engine could be lowered with a[n] SLA[6] type suspension. This decision was driven by early implementation and program cost." As a result, the Wilsons' 1997 Explorer was no more stable than the original model or its prototypes. According to the Wilsons' experts, the Explorer's inherent instability caused it to roll in

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6 "SLA" is short for "short/long arm" suspension, also known as "double wishbone" suspension.

response to Mrs. Wilson's emergency avoidance maneuver, resulting in her injuries.

2. *Roof strength defect*

As Mrs. Wilson's Explorer rolled, the roof crushed nearly a foot into the passenger compartment. The Wilsons' biomechanical expert, Dr. Anthony Sances, testified that Mrs. Wilson's spinal injury was caused by 1,000 to 2,000 pounds of force crushing down onto her shoulder. Dr. Frank Coufal, her neurosurgeon, confirmed that compressive force caused the spinal injury. The Wilsons' experts testified that a stronger roof would not have crushed and would have prevented Mrs. Wilson's injuries.

The Wilsons presented evidence that rollovers are relatively nonviolent events for the occupants when they are properly restrained and there is minimal roof intrusion, and occupants are killed or disabled only when the roof crushes inward.

The Wilsons also presented testimony from their engineering expert Stephen Forrest as to why the Explorer's roof was defectively weak. The evidence showed that Ford could have provided the Explorer with a roof that would not have crushed by using high strength steel, adding reinforcements, eliminating open sections such as the depressed weld groove, eliminating holes and/or using foam filling. Ford had used safer closed section front headers in other vehicles. These modifications would have cost about $20 per vehicle.

3. *Ford and Drew's failure to warn the Wilsons of the defects*

The Wilsons testified that Ford and Drew did not provide notice of the Explorer's roof crush risk. The Wilsons also submitted evidence that Drew failed to

warn them of the instability danger posed by inflating the P235 tires to the tire manufacturer's recommended psi. Drew did not disclose that their Explorer was equipped with larger P235 tires instead of smaller P225 or P215 tires, nor that underinflation was required for the larger tires. The salesmen at Drew were unaware of an underinflation requirement. Although Ford directed its dealers to use no more than 26 psi in P235 tires, Drew never warned the Wilsons of this fact. Because of this, the Wilsons never knew to instruct attendants to underinflate the tires below the specified 35 psi when the vehicle was serviced.

The Wilsons testified they never would have bought the Explorer if the rollover and tire pressure risks had been disclosed.

E. *Trial and Jury Verdict*

The jury deliberated for five days before reaching a verdict. It found nine to three the Explorer had a stability design defect that was a substantial factor in causing the Wilsons' injuries. The jury found 11 to one that there was a crashworthiness design defect in the roof and that this defect was also a substantial factor in their injuries.

As to Drew, the jury found 10 to two that Drew failed to warn the Wilsons of the stability defect. It found in favor of Ford on this count. The jury found 10 to two that both Ford and Drew failed to warn the Wilsons of the Explorer's crashworthiness defect.

The jury awarded Mrs. Wilson $573,348 for past economic loss, $4,032,656 for future economic loss, $6 million for past noneconomic loss and $99 million for future noneconomic loss.

The jury found nine to three that Ford acted with oppression, fraud or malice. The court's poll of the jury confirmed each of the nine jurors had found fraud, malice or oppression by clear and convincing evidence.

In a separate phase of trial, the parties presented evidence and arguments on punitive damages. During closing argument, counsel for Ford said:

> "It's impossible not to be angry at Ford, Ford Motor Company, for what decisions that in marketing and selling this Ford Explorer it knowingly put a defective product out on the market [sic] and caused the family tragedy that you see before you now.... [¶] ... [¶] ... We are sorry. I don't think-I know it rings hollow, but I am going to say it anyway. We are sorry. We are sorry that we let you down. The engineers are sorry that they let the rest of the company down."

The jury awarded $246 million in punitive damages.

F. *Posttrial Motions and Judgment*

Ford filed motions for new trial and judgment notwithstanding the verdict (JNOV).

The JNOV motion attacked the evidence supporting the punitive damages award. The court reexamined the evidence and concluded that the Wilsons had met their burden of producing clear and convincing evidence that Ford acted with malice, a conscious disregard for safety, and engaged in despicable conduct.

Ford's motion for new trial challenged the size of the compensatory and punitive damages award. The court found "the damages awarded are excessive," but also stated, "The Court does not find that the jury rendered its verdict due to passion or prejudice." The court conditionally granted a new trial unless the Wilsons consented to a reduction of Mrs. Wilson's compensatory damages award to $70 million, Mr. Wilson's loss of consortium award to $5 million and the punitive damages award to $75 million. Subtracting the jury's award of economic damages in the amount of $4,606,004, the court's remittitur left Mrs. Wilson with an award of noneconomic damages in the amount of $65,393,996.

In assessing the propriety of the amount of compensatory damages awarded to Mrs. Wilson, the court stated:

> "The evidence, in the Court's opinion, is insufficient to support a compensatory damage verdict in favor of [Mrs. Wilson] in the amount of $109,606,004. In reaching that finding and the other findings on the verdict on damages, the Court has weighed the evidence, including reasonable inferences therefrom, and is convinced from the entire record the jury clearly should have reached a different verdict on damages. That same evidence, however, ... is sufficient to support a compensatory damage award in favor of [Mrs. Wilson] in the amount of [$70 million]."

In assessing the proper amount of punitive damages to be awarded the court stated:

> "In considering these factors, the evidence showed Ford had a pattern of deficient design regarding safety in favor of increased financial returns and was a result of the conscious disregard of Ford executives. That evidence was primarily adduced through Ford's own internal memoranda and correspondence. This conduct was reprehensible and weighs in favor of punitive damages. [¶] The remittitur reduces the punitive damage award to a one-to-one ratio relative to the compensatory award. This is well within the second guidepost set forth by the Supreme Court. Even as reduced, the compensatory damage award is large. When compensatory awards are substantial, a ratio of [punitive damages] equal to the compensatory damages is within the limits of the due process guarantee. [Citation.] The punitive damages are fair and reasonable and proportionate to the amount of harm suffered by the [Wilsons]."

The Wilsons accepted the remittitur and an amended judgment was entered on September 3, 2004. Ford's timely appeals followed.

ARGUMENT

I. *EVIDENTIARY ISSUES*

A. *Bronco II Evidence*

Ford asserts it is entitled to a new trial because the trial court erroneously admitted evidence

regarding the Bronco II vehicle. This contention is unavailing.

1. *Background*

Ford contends the court erred in denying its motion in limine that sought to exclude as irrelevant "all evidence relating to the Bronco II and Ford's decision to cease manufacture of the Bronco II." In response, the Wilsons submitted evidence that the Explorer's relevant design characteristics were derived from the Bronco II and that Ford had knowledge of the rollover risk posed by that design.

The trial court denied Ford's motion, finding the Explorer's development was "intimately tied" to the Bronco II's development, as shown by Ford's internal documents.

Ford's motion for new trial asserted the court erred by allowing evidence of the Bronco II. The court rejected this argument, finding that the Wilsons "presented substantial evidence of the design carry-over from the Bronco II to the Explorer, evidence of the intermingling of the development and testing of the Bronco II and the Explorer and the similar source of rollover problems between the Bronco II and Explorer for the Court to find the two vehicles are substantially similar."

2. *Analysis*

" 'Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence.' " (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900, 122 Cal.Rptr.2d 802.) " ' "The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of

justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." ' " (*Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815, 42 Cal.Rptr.2d 459.)

The court did not abuse its discretion in admitting evidence of similar design flaws in the Bronco II to those alleged to exist in the Explorer. The Wilsons' expert, Dr. Renfroe, testified that the Explorer and the Bronco II shared the specific dangerous design characteristics that created instability. In fact, it would have been impossible not to have evidence on the similarities of the Explorer and Bronco II's stability characteristics as Ford itself assessed the stability of the Explorer by comparison to the Bronco II.

Ford asserts that it was error to introduce evidence of the Bronco II because they were different vehicles, citing many differences in design. However, the evidence went to similarities in a particular design flaw, not the vehicles as a whole. Where a plaintiff intends to adduce evidence of the functioning of related products to prove that the product in question was defective, identical conditions need not be present between the two systems. Substantial similarity is sufficient. (See *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 403404, 185 Cal.Rptr. 654, 650 P.2d 1171 (*Hasson*), *disapproved on other grounds in Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, 34 Cal.Rptr.2d 607, 882 P.2d 298 (*Soule*).) Thus, in an action against an automobile manufacturer to recover damages arising out of an automobile accident caused by brake failure in a 1966 model vehicle, the California Supreme Court held that the

trial court had a reasonable basis for admitting evidence of numerous failures occurring in 1965 models for the purpose of showing that 1966 models were similarly defective, even if plaintiffs did not prove that the 1965 system was exactly the same as the 1966 system. (*Hasson*, *supra*, at pp. 403-404, 185 Cal.Rptr. 654, 650 P.2d 1171.)

Ford argues that the Explorer's and Bronco II's stability characteristics were not sufficiently similar to allow the evidence concerning the Bronco II. The trial judge in the first instance must determine if the design characteristics are sufficiently similar. (*Hasson*, *supra*, 32 Cal.3d at p. 404, 185 Cal.Rptr. 654, 650 P.2d 1171.) As discussed, *ante*, the court found that the Bronco II's and Explorer's relevant design characteristics were substantially similar, and we must give substantial deference to that finding. (See *Bado-Santana v. Ford Motor Co.* (D.P.R. 2005) 364 F.Supp.2d 79, 92-94 [in rollover case involving Explorer, court denied Ford's motion in limine to exclude evidence of design and development history of Bronco II as too dissimilar to Explorer, finding such evidence relevant to Ford's knowledge of and failure to correct stability design flaws].)

Moreover, "[w]hen evidence is offered to show only that defendant had notice of a dangerous condition, the requirement of similarity of circumstances is relaxed: ' "[A]ll that is required ... is that the previous injury should be such as to attract the defendant's attention to the dangerous situation." ' " (*Hasson*, *supra*, 32 Cal.3d at p. 404, 185 Cal.Rptr. 654, 650 P.2d 1171.) Here, the evidence was relevant to prove that Ford knew it was

designing and manufacturing a vehicle with the same stability design defects as the Bronco II.

The Bronco II evidence was also relevant to show Ford's malice in order to support an award of punitive damages. "Marketing a product that is known to be defective and dangerous to consumers supports an inference of malice for purposes of punitive damages." (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1230, 45 Cal.Rptr.3d 265 (*Karlsson*); *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 814, 174 Cal.Rptr. 348 (*Grimshaw*); *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 895, 157 Cal.Rptr. 693, 598 P.2d 854 (*Taylor*) [malice may be shown by fact the defendant had acted with a "conscious disregard of the safety of others"].)

Ford knew that to increase a vehicle's stability, it needed to widen the vehicle's track width and lower the center of gravity. The Wilsons presented evidence that Ford engineers requested such changes in the Explorer's design, but the changes were rejected. The Explorer's center of gravity, track width and SI were substantially similar to that of the Bronco II.

The court did not abuse its discretion in admitting evidence concerning the Bronco II's stability problems, as the Explorer's stability characteristics were substantially similar. The evidence was relevant to prove the cause of the Explorer's stability defect, to show notice on Ford's part at the time it was designing the Explorer and to establish malice on the part of Ford.

B. *Exclusion of Ford's Comparative Rollover Statistics*

Ford asserts that the court erred by excluding Ford's "real-world safety record and comparative data" relating to Explorer rollover rates. We reject this contention.

1. *Background*

Ford cites several evidentiary rulings it asserts were erroneous regarding the Explorer's comparative rollover rates. First, the court ordered stricken from the trial court record testimony offered by Ford that the Explorer "had one of the best rollover rates compared to other SUV's [sports utility vehicles] in its class." The court also refused to allow Ford's automotive engineering expert, Don Tandy, to testify as to whether the Explorer had a higher rollover rate than other SUV's. Ford asserts that the court erred in refusing to allow its statistical expert, William Wecker, Ph.D., to testify that the Explorer had a rollover rate comparable to other SUV's. The court also refused to allow Ford's stability expert, Lee Carr, to testify concerning accident statistics and rollover rates of other vehicles.

Ford also contends that the court "compounded its errors" by allowing several of the Wilsons' witnesses to testify concerning their involvement in other Explorer rollover cases.

2. *Waiver*

The Wilsons assert that Ford waived the right to assert error regarding the testimony of its expert Dr. Wecker concerning the Explorer's rollover rate compared to other vehicles. The Wilsons point out that they brought a motion in limine to exclude his opinion, but the court reserved ruling on his

testimony pending a foundational showing by Ford, and thereafter Ford did not attempt to lay a foundation for his testimony.

Ford responds that the court ruled Dr. Wecker's testimony inadmissible in an unreported sidebar conference and that counsel for the Wilsons acknowledged this ruling on the record when it argued against admission of other similar evidence that Ford could not "get in from the Wecker types." Ford also asserts that it objected on several occasions more generally that it should have been allowed to present evidence of the Explorer's safety record as compared to other vehicles.

We conclude that there was no waiver. First, a review of the trial transcript indicates that counsel for the Wilsons did acknowledge on the record that Dr. Wecker's testimony was previously excluded by the court. Moreover, " '[w]here an entire class of evidence has been declared inadmissible or the trial court has clearly intimated it will receive no evidence of a particular class or upon a particular issue, an offer of proof is not a prerequisite to raising the question on appeal....' [Citation.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) ¶ 8:275.6, p. 8154.)

3. *Analysis*

Ford asserts the expert testimony concerning the Explorer's comparative rollover rate was admissible to demonstrate that the Explorer "is a reasonably safe vehicle that is not unusually prone to roll over in comparison to other vehicles." However, such evidence was irrelevant and inadmissible.

A manufacturer cannot defend a product liability action with evidence it met its industry's customs or

standards on safety. (*Grimshaw*, *supra*, 119 Cal.App.3d at p. 803, 174 Cal.Rptr. 348; *Foglio v. Western Auto Supply* (1976) 56 Cal.App.3d 470, 477, 128 Cal.Rptr. 545.) In fact, admission of such evidence is reversible error. (*Heap v. General Motors Corp.* (1977) 66 Cal.App.3d 824, 830832, 136 Cal.Rptr. 304; see also Use Note to BAJI No. 3.16 (Fall 20072008 ed.) p. 78 [entitled "Evidence of Custom in Relation to Ordinary Care"; "It is error to give this instruction in a cause of action limited to strict liability"].) This is because in strict liability actions, "the issue is not whether defendant exercised reasonable care." (*Foglio*, *supra*, 56 Cal.App.3d at p. 477, 128 Cal.Rptr. 545.) Rather, the issue is whether the product fails to perform as the ordinary consumer would expect. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 435, 143 Cal.Rptr. 225, 573 P.2d 443 (*Barker*).)

In *Grimshaw*, *supra*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348, the defect at issue was the Ford Pinto's gas tank. There, Ford requested the court instruct the jury that, in considering whether the gas tank was defective, it was to consider " 'the extent to which its (Pinto's) design and manufacture matched the average quality of other automobiles and the extent to which its design and manufacture deviated from the norm for automobiles designed and manufactured at the same point in time.' " (*Id.* at p. 803, 174 Cal.Rptr. 348.) The Court of Appeal held that the trial court properly refused the instruction as improper evidence of industry custom or practice. (*Ibid.*)

Here, the trial court properly excluded evidence Ford proffered to prove the Explorer's rollover rate was comparable to other vehicles on the road. That

evidence impermissibly sought to show that it met industry standards or custom for rollovers.

Ford asserts that the comparative rollover rate was relevant to the "risk/benefit" analysis that must be considered in determining if a product is defective, citing *Barker*, *supra*, 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443. However, as explained in *Grimshaw*, the Barker risk/benefit analysis does not allow admission of such evidence:

> "The Barker court's enumeration of factors which may be considered under the risk-benefit test not only fails to mention custom or usage in the industry, the court otherwise makes clear by implication that they are inappropriate considerations." (*Grimshaw*, *supra*, 119 Cal.App.3d at p. 803, 174 Cal.Rptr. 348.)

Ford also contends that the comparative rollover evidence was relevant to prove it did not act with oppression, fraud or malice and therefore was admissible to rebut the Wilsons' claim for punitive damages. However, as will be discussed in more detail, post, the Court of Appeal in *Grimshaw*, *supra*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348, held that compliance with industry standards or custom was irrelevant not only to the issue of defect, but also to the issue of punitive damages. (*Id.* at pp. 792, 803, 807-822, 174 Cal.Rptr. 348.) Indeed, counsel for Ford acknowledged at trial that the Wilsons' punitive damages allegations did not change *Grimshaw's* prohibition on industry custom and practice evidence.

Even if the comparative rollover data were not inadmissible as a matter of law as improper industry

and custom evidence, it would still be inadmissible as unreliable and misleading. Ford's statistics from which the comparable rollover rate testimony would flow were drawn from two databases, FARS and a state database tracking state accident information. FARS only included fatal rollover accidents and did not compare the relative stability of vehicles, included all vehicle types, not just SUV's, and did not track the cause of rollovers or the resulting injuries. The state database encompassed accidents from only 10 states, did not include the two most populous states, California and Texas, and did not detail causes of the rollovers.

In Ford's offer of proof for its expert Carr, it acknowledged his proposed testimony compared the Explorer's rollover performance to a variety of dissimilar vehicles, including Greyhound buses and passenger cars. The court excluded only that portion of his testimony. Carr opined that the Explorer's design did not contribute to the rollover. Rather, according to Carr, the Explorer rolled because Mrs. Wilson steered it onto the dirt shoulder, which, because of the loose soil and uneven terrain, would make any vehicle, not just the Explorer, susceptible to rolling over. Carr also testified that the Explorer complied with stability guidelines related to steering. Over the Wilsons' objection, Carr was allowed to show a video of the rollover response of a 1992 Chevrolet van to challenge the testing methodology used by the Wilsons' expert, Dr. Renfroe. Over the Wilsons' objection, he was also allowed to testify concerning the number of rollovers of various vehicles around the country. According to Carr, the vast majority of rollovers for all types of vehicles happened off the paved surface of the road.

Further, while the court excluded evidence of the Explorer's comparative safety, accident or injury rates, it did not exclude the Explorer's own "real-world safety record." Indeed, Ford never proffered such evidence at trial.

The court did not abuse its discretion by excluding Ford's proffered evidence on comparative rollover rates. The court also did not "compound its errors" by allowing several of the Wilsons' witnesses to testify as to their involvement in other Explorer rollover cases. Ford did not object to this testimony as improper. The only objection to this testimony overruled by the court was Ford's "asked and answered" objection.

II. NONECONOMIC DAMAGES

Ford asserts that the noneconomic damages award of approximately $65 million to Mrs. Wilson, and the $5 million award to Mr. Wilson, as remitted by the court, are excessive as a matter of law, are the result of passion and prejudice, are extreme when viewed against awards that have been upheld in comparable cases, and violate its due process rights. Amicus curiae AAM also asserts that the award violates due process principles. We conclude that the noneconomic damage award to Mrs. Wilson is excessive, the result of passion or prejudice, and that the substantial evidence in this case supports an award of $18 million. We also conclude, however, that Mrs. Wilson's award did not violate due process principles. We conclude the award to Mr. Wilson of $5 million in damages for loss of consortium is reasonable and we affirm that award.

A. *Size of the Award*

1. *Standard of review*

"The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently ... see the injury and the impairment that has resulted therefrom.... The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-507, 15 Cal.Rptr. 161, 364 P.2d 337, citation omitted (*Seffert*).)

"The reviewing court does not act de novo, however. As we have observed, the trial court's determination of whether damages were excessive 'is entitled to great weight' because it is bound by the 'more demanding test of weighing conflicting evidence than our standard of review under the substantial evidence rule....' [Citation.] All presumptions favor the trial court's determination [citation], and we review the record in the light most favorable to the judgment [citation]." (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 259, 259 Cal.Rptr. 311 (*Fortman*).)

Further, " '[w]here the trial court has required a remission as a condition to denying a new trial "a verdict is reviewed on appeal as if it had been returned in the first instance by the jury in the reduced amount." ' " (*West v. Johnson & Johnson*

Products, Inc. (1985) 174 Cal.App.3d 831, 877, 220 Cal.Rptr. 437 (West).)

2. *Analysis*

In reviewing a noneconomic damage award "[t]here are no fixed or absolute standards by which an appellate court can measure in monetary terms the extent of the damages suffered by a plaintiff as a result of the wrongful act of the defendant. The duty of an appellate court is to uphold the jury and trial judge whenever possible. [Citation.] The amount to be awarded is 'a matter on which there legitimately may be a wide difference of opinion' [citation]. In considering the contention that the damages are excessive the appellate court must determine every conflict in the evidence in respondent's favor, and must give him [or her] the benefit of every inference reasonably to be drawn from the record [citation]. [¶] While the appellate court should consider the amounts awarded in prior cases for similar injuries, obviously, each case must be decided on its own facts and circumstances. Such examination demonstrates that such awards vary greatly. [Citations.] Injuries are seldom identical and the amount of pain and suffering involved in similar physical injuries varies widely. These factors must be considered." (*Seffert, supra*, 56 Cal.2d at p. 508, 15 Cal.Rptr. 161, 364 P.2d 337.)

Further, "[t]he fact that an award may set a precedent by its size does not in and of itself render it suspect. The determination of the jury can only be assessed by examination of the particular circumstances involved." (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 654-655, 151 Cal.Rptr. 399.)

"An appellate court should not assume to substitute its appraisal, for that of a jury, of the amount of damages for physical pain and mental suffering sustained by a party in a case where trial by jury was had as a matter of right [citation], but in a case where it appears that a verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment [citations] the appellate court may reverse the judgment and remand the case for a new trial either on all the issues or on the issue of damages alone [citations], or it may, in the interests of justice and with the consent of the party against whom the modification is made, modify the judgment as to the amount of damages, and affirm it as modified [citations]." (*Deevy v. Tassi* (1942) 21 Cal.2d 109, 120-121, 130 P.2d 389 (*Deevy*); see also *Hunton v. California Portland etc. Co.* (1944) 64 Cal.App.2d 876, 882-885, 150 P.2d 221 [trial court, on a motion for new trial, found compensatory damages award excessive and reduced a jury verdict of $40,000 to $18,000; on appeal the appellate court, finding the award still excessive, reduced the damages to $10,000].)

Ford characterizes the jury's award to the Wilsons of $118 million in noneconomic damages ($105 million to Mrs. Wilson + $13 million to Mr. Wilson) and the court-reduced award of approximately $70 million (approximately $65 million to Mrs. Wilson + $5 million to Mr. Wilson) as "irrational, punitive, and the clear product of passion

and prejudice" and asserts that the evidence "does not come close to supporting this unprecedented award."[7] Although Mrs. Wilson's injuries were catastrophic, analyzing all appropriate factors, reviewing the trial court record, and using our collective experience, we conclude we must reduce the noneconomic damage award as excessive and the product of passion and prejudice. We also conclude the loss of consortium award to Mr. Wilson is reasonable and affirm that award. Because Ford focuses its discussion almost exclusively on the award to Mrs. Wilson, our analysis likewise focuses on whether that award was excessive.[8]

a. *Nature of Mrs. Wilson's injuries*

A review of the evidence shows the substantial nature of the Wilsons' noneconomic injuries. Mrs.

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[7] In making this assertion, Ford neglects to discuss the evidence in support of the Wilsons' damages at all, much less in the light most favorable to the judgment. This failure in itself would allow this court to disregard Ford's arguments concerning damages. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246, 19 Cal.Rptr.3d 416.) Nevertheless, we elect to consider Ford's contention on the merits.

[8] We also note, as discussed, *ante*, that we do not review whether the jury's original award of $118 million to the Wilsons "shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert*, *supra*, 56 Cal.2d at p. 507, 15 Cal.Rptr. 161, 364 P.2d 337.) Rather, since the court remitted the award to $70 million as a condition of denying Ford's motion for new trial, we review the noneconomic damage award " ' "as if it had been returned in the first instance by the jury in the reduced amount." ' " (*West*, *supra*, 171 Cal.App.3d at p. 877, 220 Cal.Rptr. 437.)

Wilson, a once vibrant and energetic wife and mother is now a paraplegic, who is in constant and debilitating pain, has lost all control over her bladder and bowel movements, and now requires constant care from her husband. She is disfigured and subject to ailments associated with her injuries that could worsen her injuries and shorten her life span. Mr. Wilson has lost his role as a husband. He is now a constant caregiver.

Noneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy. (Judicial Council of Cal. Civ. Jury Instns. (2008), CACI No. 3905A.)

In this case, the noneconomic damages suffered by Mrs. Wilson were substantial, permanent, and support a significant award. However, the reduced award of approximately $65 million is, even given the severity of her injuries, disproportionate to those injuries so as to "raise a strong presumption that it is based on prejudice or passion." (*Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, 807, 7 Cal.Rptr.2d 82.)

b. *Amount of award versus projected life span*

We also consider the amount of the damage award in connection with Mrs. Wilson's projected life

span of 35 years.[9] The damage award, as reduced by the court, still amounts to approximately $1,868,399 per year over her projected life span, an extremely high amount. Ford on the other hand argues an award of $1 million is reasonable, which would work out to $28,571 per year, and only $78 per day. While we believe that the award as reduced by the trial court is still excessive, we also do not believe that Ford's suggested award fairly and justly compensates Mrs. Wilson.

c. *Comparison with other awards*

In support of its position the noneconomic damage award is excessive as a matter of law, Ford attempts to compare that award to published California decisions that have upheld damage awards on similar facts. The Wilsons, on the other hand, argue that it is not appropriate to compare the award here to other cases, and that we must review it only by looking at the particular facts of this case. We conclude that while it is appropriate to look at awards in similar cases, ultimately we must determine the propriety of the award on a case-by-case basis.

In *Seffert*, *supra*, 56 Cal.2d at page 508, 15 Cal.Rptr. 161, 364 P.2d 337, the California Supreme Court stated, "While the appellate court *should consider the amounts awarded in prior cases for similar injuries*, obviously, each case must be decided

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[9] Mrs. Wilson's projected life span at the time of trial was 33 years. However, we use 35 years here because the award of noneconomic damages included an award for approximately two years of past general damages.

on its own facts and circumstances. Such examination demonstrates that such awards vary greatly. [Citations.] Injuries are seldom identical and the amount of pain and suffering involved in similar physical injuries varies widely." (Italics added.)

More recently, the California Supreme Court made the following statements in a footnote: "Defendants have compiled a lengthy list of judgments awarding damages which have been reversed on appeal as excessive. Those cases do not, in and of themselves, mandate a reversal here. The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding. [Citations.] Thus, we adhere to the previously announced and historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as a result of passion and prejudice on the part of the jurors." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65, 118 Cal.Rptr. 184, 529 P.2d 608, fn. 12 (*Bertero*), italics added.)

The Wilsons assert that *Bertero* stands for the proposition that courts of appeal should not compare the damages in other similar cases at all in reviewing a claim that an award is excessive. However, we do not read *Bertero* so broadly. Its

criticism of comparing damage awards from other cases was limited to the statement that judgments awarding damages in other cases "do not, in and of themselves, mandate a reversal." (*Bertero*, *supra*, 13 Cal.3d at p. 65, fn. 12, 118 Cal.Rptr. 184, 529 P.2d 608, italics added.) In the quoted footnote the *Bertero* court cited the earlier *Seffert* court as support for its conclusion. (*Bertero*, *supra*, at p. 65, fn. 12, 118 Cal.Rptr. 184, 529 P.2d 608.) Therefore, we conclude a verdict is not excessive as a matter of law simply because it exceeds the amount awarded in other cases. Courts of appeal must make their decisions based on the evidence in the case being reviewed. However, evidence of other verdicts is still relevant as a point of reference, to provide context to the award by establishing a range of values for similar injuries.

Ford cites five reported California decisions where noneconomic damages for purportedly similar injuries ranged from $1 million to $8.4 million. (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 96 Cal.Rptr.2d 605 [50-year-old plaintiff-award of $1 million]; *Niles v. City of San Rafael* (1974) 42 Cal.App.3d 230, 116 Cal.Rptr. 733 (*Niles*) [child suffered paralysis from head trauma-award of $1,604,371]; *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 32 Cal.Rptr.2d 136 [plaintiff rendered paraplegic from gunshot-award of $2.99 million]; *Fortman*, *supra*, 211 Cal.App.3d 241, 259 Cal.Rptr. 311 [three-year-old girl rendered paraplegic from fall from car-$6 million award]; *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 117 Cal.Rptr.2d 220, 41 P.3d 46 (*Hess*) [plaintiff rendered paraplegic after his truck rolled-$8.4 million award].)

However, the cited cases are of only small assistance. Of the five California cases cited by Ford, in only two were the damages claimed to be excessive, and in both cases the damages awards were upheld. (*Niles*, *supra*, 42 Cal.App.3d at p. 244, 116 Cal.Rptr. 733; *Fortman*, *supra*, 211 Cal.App.3d at p. 261, 259 Cal.Rptr. 311.) In the case with the largest noneconomic damage award, the size of the award was not challenged on appeal. (*Hess*, *supra*, 27 Cal.4th at p. 520, 117 Cal.Rptr.2d 220, 41 P.3d 46.) Ford cites no published California decisions involving same or similar injuries where a noneconomic damage award was reversed as excessive.

The Wilsons, on the other hand, cite an unpublished California decision upholding an award of $38 million in combined economic and noneconomic damages, reduced by 50 percent due to the plaintiff's comparative fault, to a quadriplegic who was 53 years old, and an award to his wife of $13 million for loss of consortium. The Wilsons also cite a published decision by an appellate court in Indiana that upheld an award of $55 million in combined economic, noneconomic, and loss of consortium damages, already reduced by a finding that the plaintiff was 20 percent at fault, making the total award $66 million. (*Ritter v. Stanton* (Ind.Ct.App.2001) 745 N.E.2d 828, 833, 857.)

A review of all of these cases shows a range between $1 million and $66 million in compensatory damages awards and substantial differences in the facts of each case. This demonstrates that while a comparison of other cases may give us a point of reference, ultimately our decision must be based on the evidence in this case.

d. *Evidence in record that jury acted out of passion or prejudice*

Perhaps the most important factor that we must consider in determining if the award of noneconomic damages is excessive, other than the amount of the award itself, is whether there is evidence in the record to support the defendants' claim that the jury acted out of passion or prejudice. In this case we have substantial evidence in the record that demonstrates the jury's award was the product of such improper emotions and therefore must be reduced.

In discussing economic damages in closing argument, counsel for the Wilsons argued that Mrs. Wilson suffered "an economic loss of $4.6 million dollars ..., based on the evidence that came before you." The jury awarded Mrs. Wilson that amount, and thus the reasonableness of her economic damages is not in dispute on appeal.

In discussing noneconomic damages in his closing argument, counsel for the Wilsons described some of the matters that could be included in such an award. This included past and future physical pain, mental suffering, and loss of enjoyment of life. Counsel then suggested a method for calculating these numbers, taking into account the past injury, as well as future injuries over her 33-year life expectancy. Following that discussion, counsel made the following statement: "I respectfully submit that if you look at the catastrophic injury that we have, the numbers there, *they are probably three to four times the specials is what you are going to find*. It's going to be fair, just and reasonable. And this is an awful lot of money. I know it is. It's a lot of money. But when someone says it's a lot of money, why are we doing

this, you tell them it's a lot of pain. It's a loss of a human being's dignity and worth.... And I submit to you that there is no higher value than a good woman who is a good wife, a good mother, a good neighbor, that is out there helping others. And I can't put the number on it, but I want you to be reasonable, just and fair, recognizing the humanity of this issue." (Italics added.) Thus, counsel was requesting the jury award noneconomic damages to Mrs. Wilson in an amount three to four times the amount they awarded in economic damages, or $13.8 to $18.4 million.

As to Mr. Wilson's loss of consortium claim, counsel argued that "it's probably going to be equated perhaps reasonably just to what the economic loss is for his noneconomic loss." Counsel was thus requesting that the jury award Mr. Wilson $4.6 million for his loss of consortium claim.

Next, addressing all the compensatory damages, the Wilsons' counsel stated the following:

> "I invite defense counsel to address my discussion of damages. If he does not discuss damages in his closing, if he does not disagree with me, *you can accept these numbers as reasonable and just and fair*." (Italics added.)

Defense counsel did not address the issue of damages in closing argument.

When we compare these numbers to the amount the jury awarded, it is apparent the jury disregarded the Wilsons' counsel's own statements as to what was a reasonable amount to award in this case. On noneconomic damages to Mrs. Wilson, the jury awarded $105 million, or approximately 13 times the

amount counsel represented was "fair, just and reasonable." The reduced award of approximately $65 million is still approximately three to five times that amount. The size of the award provides compelling evidence that the jury rejected what even the Wilsons' counsel believed was fair and reasonable and acted out of passion or prejudice.

The jury's award of loss of consortium damages also supports our conclusion. The jury awarded Mr. Wilson $13 million for his loss of consortium claim, or almost three times the amount the Wilsons' counsel requested.

The jury's complete rejection of the damages suggested by the Wilsons' counsel, a range for noneconomic damages and an amount for loss of consortium that counsel characterized as fair, reasonable and just, is compelling evidence the jury acted out of passion or prejudice. The fact the jury's award, and the award as remitted by the court, far exceeded, and had no relation to, the amounts requested by counsel suggests the jury was not acting as a fair and neutral trier of fact.

There was also a question posed by Ford's counsel, in light of Mrs. Wilson's catastrophic injuries, that may well have inflamed the passions of the jury significantly enough to result in the excessive damage award. Ford's trial counsel, in its last question on cross-examination of Mr. Wilson, posited the following:

> "[Q] The silver lining, to the extent that there could be one, it has brought you and [Mrs. Wilson] and the family closer together? [¶] ...

> "[A] I think where we were together before, we are together after. I don't think it's done more for us. I think it's-I don't think it's a benefit or a plus in any way. I am sorry, I don't think I can see it that way."

This question implied that the family should find a silver lining in what befell Mrs. Wilson. It may very well have been viewed as callous by the jury and might explain, in some manner, the actions of the jury in rendering a verdict so out of line with the amounts requested by the Wilsons' own counsel.

e. *Our review of the record*

In addition to considering the above factors, we have reviewed the record to determine whether the award, as remitted by the court, is excessive. This includes reviewing the nature and extent of Mrs. Wilson's injuries, the testimony of lay and expert witnesses on damages and the damage award. Our own review of the record reveals the noneconomic damage award was excessive and was the product of passion or prejudice.

f. *Conclusion*

Based on all of the above factors, and utilizing our collective experience, we conclude the award of noneconomic damages to Mrs. Wilson, even as remitted by the court, was excessive, and the facts of this case instead support an award of $18 million, within the ratio/range requested by the Wilsons' counsel. As we have discussed, *ante*, the award, even as reduced by the trial court, far exceeds the amount suggested as reasonable, fair and just by the Wilsons' attorney. That is compelling evidence the jury acted out of "passion and prejudice" in awarding

noneconomic damages. Further, although each case must be analyzed on its own facts, the award far exceeds any award we could locate that was upheld by a California appellate court.

However, the reduction to $18 million in noneconomic damages is in the range of one recent unreported decision in California where the award of such damages was upheld on appeal. Moreover, utilizing our collective experience, we conclude an award of $18 million in noneconomic damages is proportionate to Mrs. Wilson's substantial injuries, and is proportionate to the economic damages award. Considering the substantial nature of Mrs. Wilson's injuries, we conclude $18 million is a just and reasonable amount and an amount " 'a reasonable person would estimate as fair compensation' " under the circumstances of this case. (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1665, 28 Cal.Rptr.2d 88.)

Ford summarily asserts the remitted award of $5 million for loss of consortium to Mr. Wilson was also excessive, citing cases with loss of consortium awards of $229,000 to $2.55 million. However, utilizing the same factors we considered above, and noting the devastating impact on Mr. Wilson's life that Ford's conduct has caused, we do not find the remitted award for loss of consortium to be excessive or the product of passion or prejudice. The amount to which the court reduced these damages approximates the amount suggested by the Wilsons' counsel.

To avoid further delay and expense to the parties, and because the record in this matter is sufficiently definite to determine the proper amount of noneconomic damages, we will remit the award of

noneconomic damages to $18 million for Mrs. Wilson, conditioned on her acceptance of this reduced amount. If Mrs. Wilson does not agree to the reduced amount, the matter will be reversed and remanded for a new trial on the issue of noneconomic damages, as specified in California Rules of Court, rule 8.264(d).[10]

B. *Due Process Considerations*

Ford also asserts that the noneconomic damages award is "unconstitutionally excessive as a matter of federal due process." Amicus curiae AAM makes the same argument, asserting that due process considerations applicable to punitive damages awards should also apply to compensatory damages. This contention is unavailing.

Ford and AAM ignore the fact that while the United States Supreme Court has in several recent decisions held that due process rights limit the amount of punitive damages that may be imposed upon an individual, a basic underpinning of those decisions was the very distinction between

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[10] Ford asserts that if the noneconomic damages award to Mrs. Wilson is determined to be the product of passion or prejudice, we are required, as a matter of law, to grant a new trial on all issues. However, case authority demonstrates it is appropriate to issue a remittitur under such circumstances. (*See Deevy, supra*, 21 Cal.2d at pp. 120121, 130 P.2d 389; *Bellman v. San Francisco H.S. Dist.* (1938) 11 Cal.2d 576, 586589, 81 P.2d 894; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 12551256, 1 Cal.Rptr.2d 301; *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 10111012, 193 Cal.Rptr. 206.)

compensatory damages, which are designed to compensate the plaintiff, and punitive damages, which are in the nature of fines or sanctions, designed to punish and deter a defendant. For example, in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (*State Farm*), the majority opinion began its analysis by making just this distinction: "[I]n our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. [Citation.] Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.' [Citations.] By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution." After establishing this important distinction, the high court concluded that the " [t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary *punishments* on a tortfeasor." (*State Farm*, *supra*, 538 U.S. at p. 416, 123 S.Ct. 1513, italics added.) The court likened punitive damages to criminal penalties, imposed without the protections of a criminal trial: "Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." (*Id.* at p. 417, 123 S.Ct. 1513.)

Ford and AAM cite no authority for the proposition that constitutional due process limitations applicable to punitive damages awards, as recently confirmed by the United States Supreme Court (see *State Farm*, *supra*, 538 U.S. at p. 412, 123 S.Ct. 1513), also apply to compensatory damages

awards. Nevertheless, AAM asserts that the rule applicable to punitive damages awards should be extended to noneconomic damage awards because (1) defendants need notice of their potential exposure to such liability that is imposed in a vague and standardless manner, and (2) the lack of concrete standards for such awards enables juries to pursue punitive goals in rendering such awards.

However, because noneconomic damages are not a punishment that serves to deter conduct, but rather compensation to make a plaintiff whole as a result of a defendant's conduct, uncertainty in the proof does not preclude their recovery: " '[O]nce the cause and existence of damages have been ... established [with reasonable certainty], recovery will not be denied because the damages are difficult of ascertainment.... The law only requires that the best evidence be adduced of which the nature of the case is capable[,] and the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision.' " (*Dallman Co. v. Southern Heater Co.* (1968) 262 Cal.App.2d 582, 594, 68 Cal.Rptr. 873, citations omitted; see also *Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 46, 172 P.2d 867 [" 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty [in fixing the amount of damages] which his own wrong has created' "].)

As the United States Supreme Court has noted, " '[T]he common law rule as it existed at the time of the adoption of the Constitution' was that 'in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the

province of the jury that the Court should not alter it.' " (*Feltner v. Columbia Pictures Television, Inc.* (1998) 523 U.S. 340, 353, 118 S.Ct. 1279, 140 L.Ed.2d 438; see also *Barry v. Edmunds* (1886) 116 U.S. 550, 565, 6 S.Ct. 501, 29 L.Ed. 729 ["nothing is better settled than [the principle] that, in ... actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict"].) Thus, we are loath to usurp this core function of the jury by relying on quasi-mathematical formulas to assess the amount of damages that may be awarded, simply because noneconomic damages are not readily quantifiable.

Nor does the imagined danger that vague standards for imposing or reviewing noneconomic damage awards will lead juries to use such awards as punishment, as opposed to compensation, justify imposing due process limitations on such awards. The jury here was instructed it "must not let bias, sympathy, prejudice, or public opinion influence [their] decision." Although the jury was instructed that as to noneconomic damages "[n]o fixed standard exists for deciding the amount of these damages," it was also instructed that it "must use [their] judgment to decide a reasonable amount based on the evidence and [their] common sense." The jury was instructed that for future economic damages, "[Mrs.] Wilson must prove that she is reasonably certain to suffer that harm." The court, in instructing the jury on noneconomic damages, also delineated the type of harm for which Mrs. Wilson could recover:

> "Noneconomic damages may consist of the following: [¶] Past and future

> physical pain, past and future mental suffering, past and future enjoyment of life, past and future disfigurement, past and future physical impairment, past and future inconvenience, past and future grief, past and future anxiety, past and future humiliation, past and future emotional distress."

Thus, under these instructions juries are given guidance as to the proper matters they may consider in making an award of noneconomic damages. These guideposts protect against the purported danger that juries might use such an award to punish a defendant.

Moreover, to the extent that a jury's award of noneconomic damages is challenged as excessive, the judge, sitting as a 13th juror, will then review the evidence to determine if the award should be remitted. The trial judge is not limited to setting aside an excessive damage award based on evidence the jury acted out of passion or prejudice. Rather, " 'it is within the sound discretion of the trial court in ruling upon a motion for a new trial on the ground of excessive damages, to grant the same when there is a substantial conflict in the evidence regarding the extent of the damage.' " (*Hughes v. Hearst Publications, Inc.* (1947) 79 Cal.App.2d 703, 705, 180 P.2d 419.) This rule gives defendants a further check against excessive awards of noneconomic damages.

Finally, the "passion or prejudice" standard under which appellate courts review such awards also protects against excessive awards. It is true that recent cases have stated that awards for emotional distress can in some instances have a punitive element. (*Gober v. Ralphs Grocery Co.* (2006) 137

Cal.App.4th 204, 223, 40 Cal.Rptr.3d 92 (*Gober*); *State Farm*, *supra*, 538 U.S. at p. 426, 123 S.Ct. 1513.) However, here we reviewed the record and determined the evidence supported an award of $18 million, the award was within the range for similar cases, and it was proportionate to Mrs. Wilson's substantial injuries and economic loss. By reducing the noneconomic damages to $18 million, we have effectively eliminated that portion of the award that was the product of passion or prejudice, and no punitive element remains.

AAM relies heavily upon a law review article for its position that the vague standards for quantifying noneconomic damage awards justify imposing federal due process constraints on such awards. However, the author of that article concluded that the solution to such unchecked awards is limits or standards imposed by legislatures, not application of due process notions to compensatory awards. (Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System* (2004) 90 Va. L.Rev. 1401, 1414, 1417-1418.)

Ford and AAM cite one out-of-state authority that states in a footnote "[a] grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.' " (*Gilbert v. DaimlerChrysler Corp.* (2004) 470 Mich. 749, 685 N.W.2d 391, 400, fn. 22.) However, that court expressly declined to address this constitutional issue and therefore it is not authority for the proposition cited. (*Ibid.* ["there is no need to reach this constitutional question"].)

We conclude it is not necessary to impose federal due process principles to limit noneconomic damage awards because (1) the Supreme Court in *State*

Farm, *supra*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585, imposed due process limits on punitive damages awards because they are similar to criminal penalties, without the protections afforded defendants in criminal proceedings, and noneconomic damages are designed to compensate, not punish, a defendant; (2) the defendants have adequate notice of potential awards; and (3) the review accorded damage awards by trial and appellate courts ensures there is no punitive element in noneconomic damage awards.

III. PUNITIVE DAMAGES

Ford asserts the punitive damages award must be reversed because (1) the Wilsons only proved that reasonable people could disagree regarding the design decisions made by Ford; (2) it complied with all applicable governmental standards; (3) it was improper to admit evidence of Ford's overall financial condition; and (4) the award is excessive under federal and California law.

On remand from the United States Supreme Court, with directions that we reconsider *Buell-Wilson I* in light of *Philip Morris*, *supra*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940, Ford asserts (1) it is entitled to a new trial because there is a "significant risk" the punitive damages verdict against it was based on improper evidence and arguments concerning third party harm; (2) the punitive damages award was barred because Ford's conduct was objectively reasonable; (3) *Philip Morris* requires a further reduction in the punitive damages award; and (4) we should revisit our ruling excluding industry custom and practice evidence.

We reiterate our original holding that the punitive damages award, as remitted by the trial

court, is excessive and reduce it to $55 million. We reject the remainder of Ford's contentions. We also decline Ford's (and amici curiaes') request that we reconsider our original holdings on the trial court's evidentiary rulings, the emotional distress damages, and issues related to the punitive damages award other than whether that award improperly punished Ford for harm to third parties. The United States Supreme Court's direction to this court was to reconsider our original decision "in light of *Philip Morris*." (*Ford Motor Co. v. Buell-Wilson* (2007) --- U.S. ---, 127 S.Ct. 2250, 167 L.Ed.2d 1087.) The only issue decided by *Philip Morris* was whether and when third party harm could be considered in imposing punitive damages. Based on our analysis of *Philip Morris*, our review of *Buell-Wilson I*, and the proceedings in the trial court, we conclude that nothing in *Philip Morris* requires us to reconsider the remainder of our original decision.

A. *The "Reasonable People Can Disagree" Argument*

1. *Standard of Review*

We review an award of punitive damages to determine if there is substantial evidence that supports a finding by clear and convincing evidence that a defendant acted with fraud, malice or oppression. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 606, 92 Cal.Rptr.2d 897.)

2. *Analysis*

In this case the Wilsons presented evidence, which the jury accepted, that Ford knew of dangerous instability defects in the Explorer. Ford's own testing showed that the Explorer was unstable and prone to rollover on flat dry pavement at less than highway speeds. Ford knew before the Explorer

was released for sale that the same instability characteristics in that vehicle led to serious injuries to Bronco II drivers. The Wilsons presented evidence that Ford knew that the Explorer's roof was weak and that roof crush caused injury during rollover accidents. Ford had the technology to make the Explorer stable and strengthen the roof, but did not use it. The modifications to strengthen the roof would have cost approximately $20 per vehicle. This evidence constitutes substantial evidence to support the jury's decision to award punitive damages.

Ford asserts, however, that because there was a "reasonable disagreement" among experts concerning the propriety of its design decisions it cannot, as a matter of law, be subject to punitive damages. We reject this contention.

The Wilsons presented expert testimony concerning the design and safety issues of the Explorer. Ford presented contrary expert testimony. The jury rejected the testimony of Ford's experts, as it was entitled to do. Ford's assertion that punitive damages are not allowed unless all experts agree there were improper design decisions is unavailing. If such an assertion were true, punitive damages would never be allowed in cases where the defendant simply had an expert who disagreed with the plaintiff's expert.

Moreover, the California cases cited by Ford on this issue do not support its position. They were cases where there was simply a failure of proof to support a punitive damages award. (See *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 996-997, 4 Cal.Rptr.2d 837, 824 P.2d 643; *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 348,

350, 108 Cal.Rptr.2d 776, fn. 10 (*Chateau Chamberay*); *Mason v. Mercury Cas. Co.* (1976) 64 Cal.App.3d 471, 474-475, 134 Cal.Rptr. 545; *Kwan v. MercedesBenz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184185, 28 Cal.Rptr.2d 371; *Stewart v. Truck Ins. Exchange* (1993) 17 Cal.App.4th 468, 483-484, 21 Cal.Rptr.2d 338.)

Ford also asserts there was no evidence any of Ford's decision makers believed the Explorer's design presented an unreasonable risk of injury, presenting the jury with only the "bare and illogical 'inference' that unnamed Ford officials 'must have' acted with malice...." However, the Wilsons presented direct and substantial evidence of Ford management's recognition of the safety implications of their design decisions. As discussed in detail in the factual background, *ante*, there is substantial evidence that Ford's decision makers knew how to make the Explorer less dangerous, but chose not to because of financial considerations. Ford's "reasonable people can disagree" argument is unavailing.

PLAC supports Ford's arguments regarding disagreements among experts as a defense to punitive damages, asserting that where there are contemporaneous disagreements among experts regarding design decisions, punitive damages should be barred. However, PLAC cites no California authority for such a proposition. The California case law PLAC cites involves the well-established rule in insurance bad faith cases that an insurer cannot be liable for bad faith if there is an objectively reasonable dispute about coverage. (See, e.g., *Chateau Chamberay*, *supra*, 90 Cal.App.4th at pp. 347348, 108 Cal.Rptr.2d 776; *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282, 1293, 97 Cal.Rptr.2d

386.) However, these cases state a substantive standard of liability for insurance claims and do not address when it is proper to impose punitive damages. Notably, PLAC has cited no California product liability case where expert disputes concerning design provide a defense to punitive damage liability or, for that matter, liability in its entirety.

In a footnote, PLAC also cites several out-of-state cases for the proposition that a contemporaneous disagreement among experts bars liability for punitive damages. However, several of these cases simply do not state such a proposition. Rather, some stand for the proposition that expert disagreement is merely *one factor* that could be considered in assessing the propriety of punitive damages awards. (*Loitz v. Remington Arms Co., Inc.* (1990) 138 Ill.2d 404 [563 N.E.2d 397, 406407, 150 Ill.Dec. 510]; *Owens-Corning Fiberglas Corp. v. Garrett* (1996) 343 Md. 500 [682 A.2d 1143, 11581168]; *Satcher v. Honda Motor Co.* (5th Cir.1995) 52 F.3d 1311, 13161317.)

PLAC does cite two cases from Iowa that hold a reasonable disagreement among experts about the adequacy of design was a defense to punitive damages. (*Mercer v. Pittway Corp.* (Iowa 2000) 616 N.W.2d 602, 618; *Hillrichs v. Avco Corp.* (Iowa 1994) 514 N.W.2d 94, 100.) However, no case from any other state has cited these cases with approval, and we could not locate any other state that follows such a "rule." Because these cases apply Iowa law, we are not bound by their holdings and decline to adopt such a rule in California.

PLAC also argues that punitive damages should be barred where there was a contemporaneous

expert opinion that a product design that caused a plaintiff injury was necessary to avoid greater injuries of other kinds. This contention is unavailing.

First, this argument by PLAC focuses only on Ford's decisions regarding the Explorer's stability. There is no assertion that Ford allowed the roof defect to exist because changing the design would create a greater risk of other injuries. Because the roof's crashworthiness provided an independent basis for the award of punitive damages, this argument fails.

Second, PLAC cites to no evidence in the record to suggest that any member of Ford's management rejected changes to the Explorer's stability design because to do so would create a greater risk of injury in another manner. Rather, it only cites to statements made in Ford's brief that imply such a rationale, but Ford's statements are not supported by the cited record.

As such, Ford and PLAC's "reasonable people can disagree" argument is unavailing.

B. *Compliance with Government Standards*

Ford and amicus curiae the Chamber assert Ford is not subject to punitive damages as a matter of law because it complied with all applicable governmental regulatory standards. In particular, Ford asserts it complied with FMVSS (Federal Motor Vehicle Safety Standard) 216, which sets the standard for crush resistance of automobile roofs. Ford also asserts it complied with a National Highway Traffic Safety Administration (NHTSA) regulation requiring all SUV's to display a warning concerning the risk of rollovers. (See 49 Fed. Reg. 20016 (May 11, 1984).)

Ford's and the Chamber's contentions are unavailing for several reasons.

The law in California is that punitive damages are permitted in product liability actions precisely because "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. [Citations.] Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles." (*Grimshaw*, *supra*, 119 Cal.App.3d at p. 810, 174 Cal.Rptr. 348.) Compliance with a law or safety regulation in itself does not establish that a product is not defective or that a defendant who sells or rents the product for use by the public has exercised due care. (See *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126127, 184 Cal.Rptr. 891, 649 P.2d 224; *Amos v. Alpha Property Management* (1999) 73 Cal.App.4th 895, 901, 87 Cal.Rptr.2d 34.)

The Chamber asks us to reject the rule stated above in *Grimshaw*, *supra*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348, that compliance with industry standards does not bar punitive damages, because that decision predates amendments to Civil Code section 3294 that modified the definitions of "oppression, fraud [and] malice" and required proof by clear and convincing evidence. But *Grimshaw* did not base its conclusions on the standard of proof for punitive damages claims or the precise definitions of the terms "oppression, fraud and malice." The Chamber points to nothing in the 1987 amendments, or to any legislative history for those amendments, suggesting the Legislature intended to disapprove *Grimshaw*.

The Chamber relies on the extensive federal regulation of the automobile industry through the NHTSA and the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act) (49 U.S.C. § 30101 et seq.), which, in conjunction with NHTSA promulgated standards, has declared the minimum safety standards for automobiles. However, a review of the Safety Act and its legislative history demonstrates the federal government did not intend to preclude punitive damages where an auto manufacturer has met minimum safety standards.

Title 49 United States Code section 30103(e) (section 30103(e)) of the Safety Act contains a savings clause that provides:

> "Compliance with a motor vehicle safety standard prescribed under this chapter *does not exempt a person from liability at common law*." (Italics added.)

Thus, section 30103(e) expressly provides that compliance with federal safety standards is not a defense to state common law products liability. Punitive damages have long been a part of the common law, originating in the 1763 English case *Huckle v. Money* (1763) 95 Eng.Rep. 768, and finding early acceptance in the United States when the United States Supreme Court upheld their constitutionality in *Day v. Woodworth* (1851) 54 U.S. (13 How.) 363, 370, 14 L.Ed. 181. Thus, in enacting this savings clause, Congress was aware that part of the common law to which it referred in section 30103(e) included liability for punitive damages and could have excluded such damages from its terms.

The Chamber asserts that Congress, in enacting the savings clause in section 30103(e), only sought to preserve common law liability in general and did not

intend to address punitive damages. However, a review of the legislative history of the Safety Act further demonstrates that Congress intended through the savings clause to leave untouched *all* aspects of common law products liability actions, including awards of punitive damages.

The House Report for the Safety Act states that section 30103(e) "is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense *or otherwise to affect the rights of parties under common law particularly those related to warranty, contract, and tort liability*." (H.R. Rep. No. 1776-89, 2d Sess., p. 24 (1966), italics added.) The Safety Act's Senate sponsor stated on the Senate floor that "[c]ompliance with Federal standards would not necessarily shield any person from broad liability at the common law. *The common law on product liability still remains as it was*." (Remarks of Sen. Magnuson, 89 Cong. Rec. 14230 (daily ed. June 24, 1966), italics added.) Its House sponsor, while arguing in floor debate against the need for criminal penalties in the Safety Act stated, "[W]e have preserved *every single common law remedy that exists against a manufacturer* for the benefit of a motor vehicle purchaser. This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain in the buyer and they can be exercised against the manufacturer." (Remarks of Rep. Staggers, 89 Cong. Rec. 19663 (daily ed. Aug. 17, 1966), italics added.)

The fact that California does not follow this proposed rule-that compliance with federal minimum safety standards bars claims for punitive damages-is also demonstrated by the fact such a rule has been

proposed through legislation in California on several occasions but has not been enacted. In 2000 the Legislature considered a bill that would have enacted the rule that Ford proposes. (Assem. Bill No. 2582 (1999-2000 Reg. Sess.) § 1.) However, the bill never made it out of committee. (Assem. Bill No. 2582, from committee without further action, 2 Assem. Final Hist. (1999-2000 Reg. Sess.) p. 1865.) A similar bill did not secure passage in 1996. (Assem. Bill No. 2880, from committee without further action, 2 Assem. Final Hist. (1995-1996 Reg. Sess.) p. 1711.) Another such bill did not pass in 2006. (Sen. Bill No. 1429 (2005-2006 Reg. Sess.) § 2.) There would be no need for such legislation if compliance with government standards already provided a defense to punitive damages claims.

Ford and the Chamber's argument is also unavailing because there are no federal standards for stability of vehicles, one ground upon which Ford's liability for punitive damages is based. Ford points to an NHTSA regulation requiring all SUV's to display a warning concerning the risk of rollovers. (See 49 Fed. Reg. 20016 (May 11, 1984).) However, having a warning sticker is not the same as meeting a safety standard, and, in any event, it would not bar a state law claim alleging stability defects.

The Chamber asserts that NHTSA's failure to promulgate stability standards and to require only a warning sticker represents a "policy choice" based on difficulties in predicting rollover risk and that compliance with the warning requirement alone should bar punitive damages. However, this exact argument was rejected by the Eleventh Circuit in *Watkins v. Ford Motor Co.* (11th Cir.1999) 190 F.3d 1213, 1216-1218, a Bronco II rollover case. (See also

Ford Motor Co. v. Ammerman (Ind.Ct.App.1999) 705 N.E.2d 539, 555-556.) We conclude Ford's asserted compliance with federal safety regulations does not as a matter of law bar the punitive damages award.[11]

C. *Fair Notice of Exposure to Punitive Damages*

Ford contends that if punitive damages can be awarded on this record, Civil Code section 3294 is unconstitutionally vague because it failed to give Ford fair notice that its conduct could subject it to punitive damages. This contention is also unavailing.

Ford made this same argument over 25 years ago in *Grimshaw, supra*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348. The Court of Appeal rejected it, concluding that "punitive damages are recoverable in a nondeliberate or unintentional tort where the defendant's conduct constitutes a conscious disregard of the probability of injury to others." (*Id.* at p. 811, 174 Cal.Rptr. 348.)

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11 Following oral argument in this matter, the United States Supreme Court issued its decision in *Riegel v. Medtronic, Inc.* (2008) --- U.S. ---, 128 S.Ct. 999, 169 L.Ed.2d 892, holding the Food and Drug Administration's premarket approval process of a balloon catheter used in angioplasty established federal "requirements" under the Medical Device Amendments of 1976 (MDA) that preempted state common law claims for negligence, strict liability and implied warranty. That decision has no impact on our holding as the MDA had a preemption clause that affirmatively barred such claims. (*Riegel, supra*, at pp. 1003-1005.) As explained, *ante*, section 30103(e) of the Safety Act, by contrast, contains a savings clause that that explicitly *allows* such common law claims.

Additionally, Ford bases this contention on the fact that, at most, reasonable people could disagree with the decisions it made. However, we have already discussed and rejected this argument, *ante*.

D. *Consideration of Ford's Overall Financial Condition*

Ford asserts that the punitive damages award must be reversed because the jury was allowed to consider its overall financial worth (almost $13 billion) as opposed to its worth tied to sales of products in California. We reject this contention.

Where the defendant's oppression, fraud or malice has been proven by clear and convincing evidence, California law permits the recovery of punitive damages "for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) As our Supreme Court recently held in *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1185, 29 Cal.Rptr.3d 379, 113 P.3d 63 (*Simon*): "[T]he defendant's financial condition is an essential factor in fixing an amount that is sufficient to serve these goals without exceeding the necessary level of punishment. '[O]bviously, the function of deterrence ... will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.' [Citation.] '[P]unitive damage awards should not be a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes.' " (See also *State Farm*, *supra*, 538 U.S. at p. 428, 123 S.Ct. 1513 [use of wealth as a factor not " 'unlawful or inappropriate' "].)

Despite this authority, however, Ford cites *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2004)

116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317 (*R.J. Reynolds*) for the proposition that in assessing punitive damages courts may only take into consideration the defendant's financial figures in the state where the wrong occurred.

In *R.J. Reynolds*, the State of California filed a complaint against the defendant tobacco company to enforce a consent decree entered into as part of a settlement agreement that prohibited targeting youth in advertising of tobacco products. The superior court found the defendant in violation of that agreement and entered summary judgment, permanently enjoining the company from continuing to violate the settlement. The court also awarded the state sanctions in the amount of $20 million. The defendant appealed, and this court reversed the award of sanctions, finding them to be excessive. Relying on recent United States Supreme Court precedent holding it was improper to impose punitive damages against a defendant for conduct in one state based on defendant's out-of-state conduct, we held the superior court in *R.J. Reynolds* erred when it based its sanctions award on the defendant's nationwide spending on advertising, as opposed to its advertising activities in California. (*R.J. Reynolds*, *supra*, 116 Cal.App.4th at pp. 1289-1290, 11 Cal.Rptr.3d 317.) This court found the sanctions award to be error because "the People's request for $20 million in sanctions was based on Reynolds's nationwide spending on print advertising and profitability without evidence of its advertising spending or profitability in California." (*Id.* at p. 1290, 11 Cal.Rptr.3d 317.) As the court stated in *R.J. Reynolds*, "the award of sanctions for Reynolds's conduct in California could not properly be based on Reynolds's nationwide financial figures without

violating Reynolds's due process rights." (*Id.* at p. 1289, 11 Cal.Rptr.3d 317.)

Based on the above quoted language, Ford asserts that it was error to allow evidence of its overall financial condition, as opposed to its financial worth in California. This contention is unavailing.

Here, the trial court properly instructed the jury, at Ford's request, that it could not consider Ford's out-of-state *conduct* in imposing punitive damages:

> "In determining the amount of punitive damages, if any, that is necessary to achieve the proper level of punishment and deterrence, you may consider only Ford's wrongful conduct, if any, that has had an adverse impact on the citizens of California. Accordingly, you may not award any punitive damages for the purpose of punishing Ford for the sale of vehicles in other states for any injuries that may have occurred in other states, or for the purpose of changing Ford's conduct in other states."

Consideration of Ford's overall financial condition was not to punish it for out-of-state *conduct* as in *R.J. Reynolds*, but for the broader concept of ensuring the amount of punitive damages was sufficient to act as a deterrent. Use of a defendant's financial condition in such a manner is proper because " 'the function of deterrence ... will not be served if the wealth of the defendant allows [it] to absorb the award with little or no discomfort.' " (*Simon*, *supra*, 35 Cal.4th at p. 1185, 29 Cal.Rptr.3d 379, 113 P.3d 63.) Consideration of only a defendant's finances as they relate to the state in which they are sued would allow the defendant to

make them " 'a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes.' " (*Ibid.*)

E. *Amount of Award*

Ford argues that the amount of the punitive damages awarded to the Wilsons is excessive under the federal due process clause of the 14th Amendment to the United States Constitution. We conclude that, after reducing the noneconomic damages award to Mrs. Wilson to $18 million, the award of punitive damages is excessive and is, therefore, reduced to $55 million, an approximate two-to-one ratio to the total compensatory damages award ($4.6 million in economic damages + $18 million in noneconomic damages + $5 million in loss of consortium damages = $27.6 million x 2 = $55.2 million).

1. *Standard of review*

"In deciding whether an award of punitive damages is constitutionally excessive ..., we are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct. [Citations.] This '[e]xacting appellate review' is intended to ensure punitive damages are the product of the ' " 'application of law, rather than a decisionmaker's caprice.' " ' [Citation.] [¶] On the other hand, findings of historical fact made in the trial court are still entitled to the ordinary measure of appellate deference." (*Simon*, *supra*, 35 Cal.4th at p. 1172, 29 Cal.Rptr.3d 379, 113 P.3d 63, fn. omitted.)

"To state a particular level beyond which punitive damages in a given case would be grossly excessive, and hence unconstitutionally arbitrary, ' "is not an enviable task.... In the last analysis, an appellate panel, convinced it must reduce an award of punitive damages, must rely on its combined experience and judgment." ' " (*Simon*, *supra*, 35 Cal.4th at p. 1188, 29 Cal.Rptr.3d 379, 113 P.3d 63.) Moreover, our "constitutional mission is only to find a level higher than which an award *may not go*; it is not to find the 'right' level in the court's own view." (*Ibid.*)

2. *Analysis*

The United States Supreme Court has determined that the federal due process clause places limits on state courts' awards of punitive damages, limits appellate courts are required to enforce in their review of jury awards. (*State Farm*, *supra*, 538 U.S. at pp. 416418, 123 S.Ct. 1513.) The imposition of "grossly excessive or arbitrary" awards is constitutionally prohibited, for due process entitles a tortfeasor to " 'fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.' " (*Id.* at pp. 416, 417, 123 S.Ct. 1513.)

In *State Farm* the United States Supreme Court concluded it was improper for juries, in awarding punitive damages, to punish a defendant for its dissimilar actions in other states affecting individuals other than the plaintiff. (*State Farm*, *supra*, 538 U.S. at pp. 421-423, 123 S.Ct. 1513.) However, the Supreme Court reiterated that, in determining the reprehensibility of a defendant's actions, juries could consider a defendant's similar repeated conduct that affected others. (*Id.* at p. 423, 123 S.Ct. 1513.)

The United States Supreme Court and the California Supreme Court have stated there are three factors to consider in determining whether the amount of a punitive damages award comports with the federal due process clause: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the ... harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages [and comparable civil penalties where available]." (*State Farm*, *supra*, 538 U.S. at p. 418, 123 S.Ct. 1513; *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 29 Cal.Rptr.3d 401, 113 P.3d 82 (*Johnson*).) We discuss these factors in order.

a. *Reprehensibility of conduct*

Courts utilize five factors to help determine the degree of reprehensibility of a defendant's conduct: (1) whether the harm was physical and not merely economic; (2) whether the conduct demonstrated an indifference or reckless disregard for the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct was repeated or an isolated incident; and (5) whether the conduct was the result of intentional acts or mere accident. (*State Farm*, *supra*, 538 U.S. at p. 419, 123 S.Ct. 1513; *Simon*, *supra*, 35 Cal.4th at p. 1180, 29 Cal.Rptr.3d 379, 113 P.3d 63.) Further, the reprehensibility of a defendant's conduct is the most important indicator of the reasonableness of a punitive damages award. (*State Farm*, *supra*, at p. 419, 123 S.Ct. 1513; *Simon*, *supra*, at p. 1180, 29 Cal.Rptr.3d 379, 113 P.3d 63.)

Based on our de novo review of the record, we conclude that the reprehensibility of Ford's conduct was high, given the catastrophic nature of Mrs.

Wilson's injuries, Ford's reckless disregard for the safety of others, the repeated nature of Ford's conduct, and the fact that Ford's acts were intentional.

Focusing on the first factor, Ford's decision to release the defective Explorer resulted in catastrophic and permanent physical injuries to Mrs. Wilson, not merely economic loss. She is permanently paralyzed and in constant, debilitating pain. She is confined to a wheelchair, without sensation or muscular control of her lower body. She must rely on others to care for her. As Mrs. Wilson explained it:

> "Me being dependent on other people ... for me that is very difficult because I have always been an independent sort of person.... I have always been the one that has done things for other people. For me that is very hard to ... have to be in that kind of position.... I am in a wheelchair, I am not going to ever be out of a wheelchair, that whole concept is very ... difficult to ... accept.... The things that I really love to do I can't do anymore. The list is just-goes on and on."

As discussed, *ante*, and as found by the jury, Ford's decision to release the defective Explorer without warning consumers of the risk of injury it posed evinced a reckless disregard for the safety of its customers. As the trial court noted in ruling on Ford's motion for new trial on the ground the punitive damage award was excessive, "the evidence showed Ford had a pattern of deficient design regarding safety in favor of increased financial

returns and was the result of the conscious disregard of Ford executives." Our own independent review of the record compels the same conclusion. Thus, the second factor also supports a significant punitive damages award.

Addressing the third factor, the target of the conduct in this case was consumers, individuals who were vulnerable as they would not understand vehicle design, development and manufacture, and would rely on Ford to inform them of risks as they made purchasing decisions.

Conduct is more reprehensible where, as here, it is part of repeated corporate policy or practice rather than an isolated incident. (*Johnson*, *supra*, 35 Cal.4th at p. 1196, 29 Cal.Rptr.3d 401, 113 P.3d 82.) In this case the conduct was repeated and not an isolated incident. Ford had a pattern of deficient safety design that was ignored in favor of increased financial returns. As discussed in more detail, *ante*, that corporate policy or practice was evidenced by Ford's refusal to follow its engineers' recommendations to improve the stability of the Explorer. As the trial court noted, "[T]hat evidence was primarily adduced through Ford's own internal memoranda and correspondence." Thus, the fourth factor supports a large punitive damages award.

The evidence presented by the Wilsons in this case supports a finding that Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management, knowing the unreasonable risk of harm posed to consumers, as opposed to a mere accident.

Moreover, the fifth factor, whether the conduct was the result of intentional acts or mere accident, "is of little value in assessing a California punitive

damages award, as accidentally harmful conduct cannot provide the basis for punitive damages under our law. At a minimum, California law requires conduct done with 'willful and conscious disregard of the rights or safety of others' or despicable conduct done 'in conscious disregard' of a person's rights." (*Simon*, *supra*, 35 Cal.4th at p. 1181, 29 Cal.Rptr.3d 379, 113 P.3d 63.) The jury's finding that Ford acted with "oppression, fraud or malice" demonstrates Ford's actions were intentional. In sum, the reprehensibility of Ford's conduct supports a significant award of punitive damages.

b. *Ratio of punitive to compensatory damages*

In *State Farm*, the United States Supreme Court, while still "declin[ing] ... to impose a bright-line ratio which a punitive damages award cannot exceed," held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*State Farm*, *supra*, 538 U.S. at p. 425, 123 S.Ct. 1513.) The high court "also explained that past decisions and statutory penalties approving ratios of 3 or 4 to 1 were 'instructive' as to the due process norm, and that while relatively high ratios could be justified when ' "a particularly egregious act has resulted in only a small amount of economic damages" [citation] ... [t]he converse is also true[:] When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.' " (*Simon*, *supra*, 35 Cal.4th at p. 1182, 29 Cal.Rptr.3d 379, 113 P.3d 63.)

Our high court has interpreted this language from *State Farm* to mean that it established a "type of presumption: ratios between the punitive damages

award and the plaintiff's actual or potential compensatory damages significantly greater than 9 or 10 to 1 are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause." (*Simon*, *supra*, 35 Cal.4th at p. 1182, 29 Cal.Rptr.3d 379, 113 P.3d 63.)

Here, after our reduction of the noneconomic damages awarded to Mrs. Wilson, the compensatory damages, while substantial, are within a reasonable range for the type of catastrophic, permanent and ongoing injuries suffered by Mrs. Wilson, and the loss of her society, comfort and companionship to Mr. Wilson. Mrs. Wilson's recovery for noneconomic damages is proportionate to the injuries she suffered. Similarly, Mr. Wilson's recovery on his loss of consortium claim is proportionate to his substantial injury. Moreover, as discussed, *ante*, there was a high degree of reprehensibility to Ford's conduct. Because the noneconomic damages award is substantial, a low single digit ratio is appropriate. We are mindful of the Supreme Court's statement in *State Farm*, *supra*, 538 U.S. at page 425, 123 S.Ct. 1513, that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." In this case we conclude that a two-to-one ratio is warranted because the degree of Ford's reprehensibility is also high.

c. *Comparable civil penalties*

Ford does not address this factor in its opening brief. However, for the first time in its reply brief

Ford asserts that there are comparable civil penalties to compare with the amount of the punitive damages claim. Ford cites title 49 United States Code section 30165(a), which it claims provides penalties for designing and selling defective vehicles, penalties that are $1,000 for each vehicle, up to a maximum of $800,000. Ford asserts that since the punitive damages award "dwarfs" the maximum penalties allowed under that federal statute, the punitive damage award is constitutionally infirm. This contention is unavailing.

First, we do not consider matters raised by appellants for the first time in their reply briefs. Because Ford did not address this factor in its opening brief, thus denying the Wilsons an opportunity to respond, it has waived the right to assert this issue on appeal. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4, 27 Cal.Rptr.3d 648, 110 P.3d 903; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10, 93 Cal.Rptr.2d 364.)

Second, title 49 United States Code section 30165(a) is part of that portion of the Safety Act which provides, as discussed, *ante*, only minimum safety standards.

Third, as also discussed in detail, *ante*, there is a savings clause that allows common law liability notwithstanding compliance with those standards, putting Ford on notice it may be subject to private state actions that result in substantially higher damage awards than civil penalties.

Fourth, the savings clause also evidences congressional intent that the maximum penalty allowed under title 49 United States Code section

30165 (a) is not a sufficient penalty for all such violations because the varying degrees of plaintiffs' injuries and defendants' culpability dictate a greater flexibility in punishment. (See *Ford Motor Co. v. Sperau* (Ala.1997) 708 So.2d 111, 122.)

Finally, the sanctions amounts in title 49 United States Code section 30165(a) were increased in 2000 to a range of $5,000 to $15 million, indicating Congress's belief that the original amounts were insufficient to deter vehicle manufacturers from placing defective automobiles on the road. The maximum penalty under the 2000 amendments is not "dwarfed" by the punitive damage award, as reduced.

d. *Conclusion*

Based on the foregoing factors, and using our combined experience and judgment, we conclude that a two-to-one ratio of punitive damages to compensatory damages is sufficient to punish Ford and deter it from similar conduct in the future. This ratio is proportionate to the degree of harm suffered and the substantial award of compensatory damages. An award exceeding a two-to-one ratio would exceed the constitutional maximum that could be awarded under the facts of this case. (*Simon*, *supra*, 35 Cal.4th at p. 1188, 29 Cal.Rptr.3d 379, 113 P.3d 63 [an appellate court's "constitutional mission is only to find a level higher than which an award *may not* go; it is not to find the 'right' level in the court's own view"].) Accordingly, we reduce the punitive damage award to $55 million, approximately two times the total compensatory damage award to the Wilsons.

F. *Application of Philip Morris to Reduced Punitive Damages Award*

1. *Introduction*

The United States Supreme Court has remanded this matter with direction that we reconsider our award of punitive damages in light of the high court's decision in *Philip Morris*, *supra*, 549 U.S. at pages ___ - ___, 127 S.Ct. at page 1063, 166 L.Ed.2d at pages 948-949, holding juries cannot use punitive damages to punish defendants for harm caused to third parties.

We have reconsidered our original decision in *Buell-Wilson I* and have analyzed the application of *Philip Morris* to our holdings in that decision. We have also reviewed and analyzed the relevant trial court proceedings in this matter. Based on that reconsideration, review, and analysis, we conclude *Philip Morris* does not necessitate a change in our original decision in this matter because (1) Ford has forfeited the right to raise the issue whether there is significant risk the jury, in determining the amount of punitive damages to award, punished Ford for harm it caused to third parties; (2) our previous reduction of the punitive damages award to two times the compensatory award eliminated any danger the jury punished Ford for harm to third parties; and (3) there was no evidence or argument at trial that created a significant risk the jury here punished Ford for harm to third parties.

2. *Philip Morris*

The family of Jesse Williams, a long-time smoker, sued *Philip Morris* USA (*Philip Morris*) for negligence and deceit. (*Philip Morris*, *supra*, 549 U.S. at p. ___, 127 S.Ct. at p. 1060, 166 L.Ed.2d at p.

946.) The jury concluded Williams's death was caused by smoking and found for the plaintiffs on their claims for negligence and deceit. On plaintiffs' claim for deceit, the jury awarded $821,000 in compensatory damages and $79.5 million in punitive damages. The trial judge determined the punitive damages award was excessive and reduced it to $32 million. Both parties appealed, and the Oregon Court of Appeals reinstated the full award of punitive damages. (*Ibid.*) The Oregon Supreme Court denied review.

Philip Morris appealed to the United States Supreme Court, and the case was remanded for further review in light of the Supreme Court's decision in *State Farm*, *supra*, 538 U.S. 408, 123 S.Ct. 1513, which held, as we have discussed, *ante*, that the due process clause of the United States Constitution imposes limits on the amount a jury may award for punitive damages. *Philip Morris* raised two arguments on remand: (1) The jury should not have been permitted to consider injuries to third parties not before the court when awarding punitive damages, and (2) the punitive damages award was excessive under *State Farm*. (*Philip Morris*, *supra*, 549 U.S. at p. __, 127 S.Ct. at p. 1061, 166 L.Ed.2d at p. 946.) The Oregon Supreme Court rejected both arguments, and *Philip Morris* again appealed to the United States Supreme Court.

In *Philip Morris*, the United States Supreme Court held *Philip Morris*'s rights under the due process clause of the Fourteenth Amendment were violated when the jury considered harm to third parties as a factor when determining the amount of punitive damages, because the "Due Process Clause forbids a State to use a punitive damages award to

punish a defendant for injury that it inflicts upon nonparties...." (*Philip Morris*, *supra*, 549 U.S. at p. ___, 127 S.Ct. at p. 1063, 166 L.Ed.2d at p. 948.) The Supreme Court concluded that such punishment violates the rule that a state must afford a defendant an opportunity to present every available defense. (*Ibid.*) A defendant "threatened with punishment for injuring a nonparty victim" may be unable to present defenses applicable to the nonparty victim if those defenses do not also coincide with those relevant to the plaintiff's claim. (*Ibid.*)

Philip Morris also emphasized, however, that a plaintiff may offer evidence of "harm to other victims" to show the reprehensibility of a defendant's conduct. (*Philip Morris*, *supra*, 549 U.S. at pp. ___-___, 127 S.Ct. at p. 1064, 166 L.Ed.2d at pp. 949950.) Reiterating its holding in *State Farm*, the Supreme Court held " [e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." (*Philip Morris*, *supra*, 549 U.S. at p. ___, 127 S.Ct. at p. 1064, 166 L.Ed.2d at p. 949.) "[A] jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Id.* at pp. ___-___, 127 S.Ct. at p. 1064, 166 L.Ed.2d at pp. 949950.) Where there is a "significant" risk that the jury might do so "because, for example, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury-a court, *upon request*, must protect against that risk." (*Id.* at p. ___, 127 S.Ct. at p. 1065, 166 L.Ed.2d at p. 951, italics added.)

3. *Forfeiture*

a. *Jury instructions and arguments at punitive damages phase of trial*

(1) *Ford's proposed Special Jury Instruction Nos. 19 & 21*

At the bifurcated punitive damages phase of the trial, Ford proposed Special Jury Instruction No. 21, instructing the jury not to consider third party harm *for any purpose*:

> *"In determining the appropriate amount of punitive damages, if any, in this case, you may consider only the harm to the plaintiffs.* Any individuals other than the plaintiffs who might claim to have been harmed by Ford have the right to bring their own lawsuit seeking damages for any alleged injuries they may have incurred. Therefore, if you decide to award any punitive damages, *your award must be limited to redressing the injuries incurred only by the plaintiffs in this lawsuit.*" (Italics added.)

In discussions regarding punitive damages instructions, counsel for Ford made the following argument regarding this instruction: "On [Special Jury Instruction] No. 21, particularly *State Farm*, in a product case, it tells the jury that they are only to focus on these particular plaintiffs. The *Romo [v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 6 Cal.Rptr.3d 793 (*Romo*)] case refers to that same principle as opposed to trying to redress ... claims of other parties. So we would request and argue that

that instruction is required by the due process clause and California law as it is developing."

The court denied counsel's request it give that and several other special jury instructions, stating that they "are argumentative, misstate the law, or are already covered by the instructions that we will give from CACI." Ford at no time suggested a modification of Special Jury Instruction No. 21 or a separate instruction to clarify that the jury could consider harm to third parties in deciding reprehensibility.

Ford also proposed an instruction, Special Jury Instruction No. 19, based on *State Farm*, *supra*, 538 U.S. 408, 123 S.Ct. 1513, that told the jury it could not consider Ford's actions and impact outside the State of California, but also stated that the jury *could* consider the impact of Ford's conduct on individuals other than the plaintiffs inside the State of California:

> "In determining the amount of punitive damages, if any, that is necessary to achieve the proper level of punishment and deterrence, you may consider only Ford's wrongful conduct, if any, that has had an adverse impact *on the citizens of California*. Accordingly, you may not award any punitive damages for the purpose of punishing Ford for the sale of vehicles in other states for any injuries that may have occurred in other states, or for the purpose of changing

> Ford's conduct in other states."[12] (Italics added.)

Counsel for plaintiffs requested Special Jury Instruction No. 19 be modified to state "in determining the reprehensibility of Ford's actions, you may consider Ford's conduct in California and elsewhere." As counsel explained to the court, "[W]hen talking about the reprehensibility of Ford's actions which is the chief and primary consideration or guidepost that the jury must consider, I believe that under the case law they are entitled from an evidentiary standpoint to consider acts outside of California so long as they are similar to what we are dealing with in this case. [A]s long as when awarding the amount of punitive damages they focus on the harm to this plaintiff and the act that was done to this plaintiff. When dealing with the issue of reprehensibility though, is this an isolated act or have they done this elsewhere, I think they can consider extraterritorial [conduct]." The court refused the requested modification and gave Special Jury Instruction No. 19 as proposed by Ford.

(2) *Plaintiff's proposed Special Jury Instruction No. 1*

Plaintiffs proposed Special Jury Instruction No. 1, based on *State Farm*, *supra*, 538 U.S. 408, 123 S.Ct. 1513, listed the factors to consider in determining reprehensibility, including "whether the conduct involved repeated actions or an isolated incident." Ford objected to that instruction. While Ford

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[12] Ford also brought a motion in limine before trial seeking to bar "evidence or argument concerning Ford's out-of-state sales, profits or conduct."

acknowledged the proposed instruction tracked *State Farm's* discussion of "factors that are relevant to ... reprehensibility," Ford asserted those factors were not "exclusive" and argued that if the instruction were given, the court should add additional factors: "First, whether the defendant's conduct was consistent with industry standards and customs. Second, whether defendant's conduct conformed to government safety standards. And third, whether the defendant had a reasonable ground for believing its conduct was lawful." Ford also argued the repeated conduct factor was inapplicable to a product liability case involving the sale of vehicles because "it's inappropriate and misleading to suggest to the jury the fact that ... the company was engaging in its lawful business, selling multiple automobiles, could somehow be an evil that was punishable."

The court rejected plaintiffs Special Jury Instruction No. 1. With regard to the reprehensibility factor and whether the conduct was an isolated or repeated act, the court stated: "... I think that flies in the face of what the court will be instructing on with regard to No. 19, saying not to consider ... injuries that have occurred in other states." The court also stated, "The jury understands the word 'reprehensible.' [B]oth sides are going to be able to argue this case and you can say why it is or is not reprehensible."

(3) *Punitive damages instructions given by court*

The court instructed the jury as follows on punitive damages: "The purposes of punitive damages are to punish a wrongdoer and to discourage it and others from similar conduct in the future. There is no fixed standard for determining the amount of punitive damages and you are not

required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following separately for ... the defendant. A, how reprehensible was the defendant's conduct; B, is there a reasonable relationship between the amount of punitive damages and [the plaintiffs'] harm; C, in view of the defendant's financial condition, what amount is necessary to punish it and discourage future wrongful conduct. [¶] You should keep in mind that compensatory damages, although awarded to compensate plaintiffs for their injuries, also may ... have the effect of punishing and deterring misconduct. Therefore, in determining whether and in what amount to award any punitive damages, you should consider the deterrence and punishment imposed solely by any [punitive] damages you may award and when added to the sum you have already imposed as compensatory damages. [¶] In determining the amount of punitive damages, if any, that is necessary to achieve the proper level of punishment and deterrence, you may consider only Ford's wrongful conduct, if any, that has had an adverse impact on the citizens of California. Accordingly, you may not award any punitive damages for the purpose of punishing Ford for the sale of vehicles in other states for any injuries that may have occurred in other states, or for the purpose of changing Ford's conduct in other states. [¶] Punitive damages must bear a reasonable relationship to compensatory damages."

(4) *Closing argument*

As will be discussed in more detail, *post*, in closing argument when discussing the reprehensibility of Ford's conduct, plaintiffs' counsel made reference to the impact of Ford's actions on

third parties within California, stating such things as "thousands of these vehicles were manufactured and sold in their defective condition and they are on our highways in California," and "they marketed to specifically, the soccer moms, the women with babies, the toddler seats, the families."

At no time during closing arguments did Ford object to the statements made by plaintiffs' counsel. Further, in its own closing arguments counsel for Ford did not caution the jury to focus only on the injuries to plaintiffs or on Ford's impact in California. Indeed, in responding to plaintiffs' closing argument, Ford's counsel *emphasized* plaintiffs' counsel's reference to targeting "soccer moms," stating, "Mr. Schoville said to you that they targeted the soccer moms. That they ... let this vehicle out to the people out in California, knowing that it was dangerous and defective." Ford attempted to rebut this argument by noting the testimony of Ford's management that they and their families drove Explorers and commented, "[D]o you really believe that they are going to put their own families at risk if they knowingly put out a defective vehicle." Ford's argument focused on apologizing for its actions and asking the jury not to punish Ford for the fact it was a large corporation or because the lawyers "did a lousy job defending the company." Counsel for Ford commented about the "David versus Goliath" nature of the case, stating, "You saw the full wrath, if you will, Ford's power demonstrated for you in the number of lawyers and the amount of money they paid their experts." Nevertheless, counsel argued the verdict was the product of Ford being "out-lawyered. With all our money and all our power, we were out-lawyered."

Counsel for Ford also attempted to present evidence that was excluded at trial concerning (1) the number of times they had successfully defended this type of case, (2) the overall safety record of the Explorer, and (3) comparing the risk of the Explorer to other vehicles. Plaintiffs' counsel objected to this attempted argument, and the court sustained the objections.

After the court instructed the jury and the jury began deliberations, counsel for Ford belatedly objected to plaintiffs' closing argument and requested a mistrial, arguing it was improper for plaintiffs' counsel to argue "this was a case not about these plaintiffs but about soccer moms and other families." The court denied the motion. The court also interpreted the motion as one to strike the belatedly objected-to portions of plaintiffs' counsel's argument, noting it was not practical to send a note to the jury saying that portions of the argument had been stricken.

b. *Analysis*

(1) *The court properly rejected Ford's Special Jury Instruction No. 21*

As discussed, *ante*, *Philip Morris* holds that "*upon request* " trial courts must "provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused to strangers." (*Philip Morris*, *supra*, 549 U.S. at pp. _ , _, 127 S.Ct. at pp. 1065, 1064, 166 L.Ed.2d at pp. 951, 950, italics added.)

At the bifurcated punitive damages portion of the trial, Ford argued *Romo* and *State Farm* required the court to instruct the jury that, in determining the

appropriate amount of punitive damages, if any, it could not punish Ford for harm caused to third parties. However, Ford's Special Jury Instruction No. 21 was an incorrect and incomplete statement of the law and contradicted the holdings of *Philip Morris* and *State Farm*. Ford's proposed Special Jury Instruction No. 21, did not merely tell the jury it could not impose punishment for harm suffered by third parties. Rather, it told the jury it could not consider third party harm *for any purpose*, including in assessing the reprehensibility of Ford's conduct. As proposed, Ford's instruction directly contradicted the holding of *Philip Morris* that a plaintiff may show "harm to other victims" in order to demonstrate a defendant's conduct "was particularly reprehensible." (*Philip Morris*, *supra*, 549 U.S. at p. ___, 127 S.Ct. at pp. 10631064, 166 L.Ed.2d at p. 949.) In fact, this rule was well established at the time Ford proposed its instruction and had recently been confirmed in *State Farm*, *supra*, 538 U.S. at pages 419, 423, 123 S.Ct. 1513, upon which Ford relied in urging the court to give its Special Jury Instruction No. 21.

Ford's Special Jury Instruction No. 21 contradicted another instruction the court gave to the jury, namely, "in deciding the amount of punitive damages," the jury must consider "how reprehensible was the defendant's conduct." Under *State Farm*, two factors the jury was charged with determining in assessing the reprehensibility of Ford's conduct were whether the conduct demonstrated an indifference or reckless disregard for the safety of others and whether the conduct was repeated or an isolated incident. (*State Farm*, *supra*, 538 U.S. at p. 419, 123 S.Ct. 1513.) Thus, Ford's proposed Special Jury Instruction No. 21 not only directly contradicted the

holdings in *State Farm* and *Philip Morris*, but it also contradicted another instruction given by the court.

An appropriate jury instruction would have been one similar to BAJI No. 14.72.2, which was amended to comport with *Philip Morris*, and which delineates the purposes for which a jury may consider third party harm and for what purpose a jury could not: "... If you find that defendant had a practice of engaging in, and profiting from wrongful conduct [occurring in California] similar to that which injured the plaintiff, that evidence may be considered in deciding the issues of reprehensibility, whether punitive damages should be assessed, and if so, the amount of punitive damages to be awarded. *Do not include in your award of damages any sum that represents damages for injuries to any person other than the plaintiff[s].*" (BAJI No. 14.72.2 (Fall 2007-2008 ed.), italics added.)

California law provides that incorrect or misleading jury instructions may be rejected by the courts: " 'A trial court has no duty to modify or edit an instruction offered by either side in a civil case. If the instruction is incomplete or erroneous the trial judge may ... properly refuse it.' " (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1673, 26 Cal.Rptr.3d 638 (*Boeken*), quoting *Truman v. Thomas* (1980) 27 Cal.3d 285, 301, 165 Cal.Rptr. 308, 611 P.2d 902.) Thus, by proposing an instruction that was an incorrect and misleading statement of law,

Ford has forfeited the right to assert instructional error before this court.[13]

Further, the fact Ford relies on *Philip Morris* to assert its due process rights were violated does not change this result: "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. While this court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts...." (*Yakus v. United States* (1944) 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834, citations omitted.) Indeed, the Supreme Court has held that it is precluded from reaching a due process challenge because of a party's failure to submit relevant jury instructions: "We have no difficulty agreeing with the State that [defendant's] counsel's failure to urge that the court instruct the jury on

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13 Parties often refer to this as a "waiver." However, that term is incorrect. "[T]he terms 'waiver' and 'forfeiture' long have been used interchangeably. As the United States Supreme Court has explained, however, '[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." ' " (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9, 108 Cal.Rptr.2d 385, 25 P.3d 598, quoting *United States v. Olano* (1993) 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508.)

scienter constitutes an independent and adequate state-law ground preventing us from reaching [defendant's] due process contention on that point." (*Osborne v. Ohio* (1990) 495 U.S. 103, 123, 110 S.Ct. 1691, 109 L.Ed.2d 98.)

In both criminal and civil cases, the United States Supreme Court will not review a federal claim arising out of state court litigation unless there is "no doubt from the record" the claim "was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." (*Webb v. Webb* (1981) 451 U.S. 493, 501, 101 S.Ct. 1889, 68 L.Ed.2d 392.) Similarly, California courts have declined to review claims of federal constitutional error in the absence of a specific and timely objection made in the trial court. (See *People v. Monterroso* (2004) 34 Cal.4th 743, 759, 22 Cal.Rptr.3d 1, 101 P.3d 956, *cert. den.* (2005) 546 U.S. 834, 126 S.Ct. 61, 163 L.Ed.2d 89; *People v. Burgener* (2003) 29 Cal.4th 833, 869, 129 Cal.Rptr.2d 747, 62 P.3d 1, *cert. den.* (2003) 540 U.S. 855, 124 S.Ct. 146, 157 L.Ed.2d 100.)

Thus, by proposing a jury instruction that incorrectly and incompletely stated the law, and contradicted existing precedent and other jury instructions given by the court, Ford forfeited its due process challenge to the punitive damages award.

It is true, as Ford asserts, that trial courts have an obligation to instruct juries on the "controlling legal principles" in a case, even in the absence of a specific request from one of the parties. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 951, 160 Cal.Rptr. 141, 603 P.2d 58.) However, this rule only comes into play when there is "a complete failure to instruct on

material issues and controlling legal principles." (*Ibid.*) " '[I]f its charge does not fully cover the facts and issues as counsel conceive them, it is [counsel's] duty to request instructions upon specific questions arising.' " (*Thomas v. Buttress & McClellan, Inc.* (1956) 141 Cal.App.2d 812, 820, 297 P.2d 768.) Here, the court did instruct the jury on the controlling legal principles concerning punitive damages. If Ford wanted a limiting instruction concerning third party harm, it was Ford's duty to supply an accurate and complete instruction, which it did not do here.

Nor can Ford complain that it could not anticipate *Philip Morris* would reiterate the rule that juries could consider third party harm in determining reprehensibility. At the time of the punitive damages phase of the trial in June of 2004, both state and federal case law uniformly held a defendant's similar wrongful conduct toward others was a proper consideration in evaluating the reprehensibility of the defendant's conduct toward the plaintiff, and therefore was a proper consideration in determining the amount of punitive damages to award: " *State Farm*, in turn, did not bar deterrence of future public injuries as a goal of punitive damages. The court reiterated its statement in *BMW [of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809 (BMW),] that ' "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition" ' (*State Farm*, *supra*, 538 U.S. at p. 416[, 123 S.Ct. 1513)] and *did not limit the concept to punishment and deterrence purely on behalf of the plaintiff*. In elaborating on *BMW's* reprehensibility guidepost, the court in *State Farm* noted that conduct involving 'repeated actions' was worse than,

and could be punished more severely than, conduct limited to 'an isolated incident.' (*State Farm*, *supra*, at p. 419[, 123 S.Ct. 1513].)" (Johnson, *supra*, 35 Cal.4th at p. 1206, 29 Cal.Rptr.3d 401, 113 P.3d 82, italics added.) "To consider the defendant's entire course of conduct in setting or reviewing a punitive damages award ... is not to punish the defendant for its conduct toward others." (*Id.* at p. 1206, fn. 6, 29 Cal.Rptr.3d 401, 113 P.3d 82.)

Indeed, in arguing for Special Jury Instruction No. 21, counsel for Ford cited *Romo*, *supra*, 113 Cal.App.4th 738, 6 Cal.Rptr.3d 793, *disapproved on other grounds in Johnson*, *supra*, 35 Cal.4th at pages 12051207, 1213, 29 Cal.Rptr.3d 401, 113 P.3d 82, for the proposition that the jury could not punish it for harm to third parties. In *Romo*, the Fifth District Court of Appeal, anticipating *Philip Morris*, concluded that in *State Farm* the Supreme Court had already held that it was improper to punish defendants for harm to third parties: "As we read *State Farm*, then, the legitimate state goal that punitive damages may seek to achieve is the 'condemnation of such conduct' as has resulted in 'outrage and humiliation' to the plaintiffs [citation]; it is not a permissible goal to punish a defendant for everything else it may have done wrong." (*Romo*, *supra*, at pp. 749750, 6 Cal.Rptr.3d 793.) Elsewhere, the *Romo* court stated that juries may only punish defendants "based solely on the harm to the plaintiffs." (*Id.* at p. 753, 6 Cal.Rptr.3d 793.) However, the *Romo* court also correctly predicted *Philip Morris's* reiteration that third party harm could still be considered on the issue of reprehensibility: "[T]his focus upon punishing the defendant solely for the outrage inflicted upon the present plaintiffs is not an evidentiary limitation.

Plaintiffs are still entitled to show similar conduct on the issue of reprehensibility." (*Romo*, *supra*, at p. 753, fn. 7, 6 Cal.Rptr.3d 793.)

Based on its knowledge of existing precedent, Ford could have crafted a jury instruction (or instructions) that properly and completely informed the jury for what purposes it could consider third party harm and for what purposes it could not. Nevertheless, Ford elected to submit to the court an instruction contrary to this well-established precedent-precedent it *relied upon* in arguing the court should give Special Jury Instruction No. 21. Instead, Ford argued against plaintiff's Special Jury Instruction No. 1, which instructed the jury it could consider Ford's repeated conduct in assessing reprehensibility. Ford even went so far as to argue that if the court gave an instruction on the factors delineated in *State Farm* and in California authority (see, e.g., *Simon*, *supra*, 35 Cal.4th at p. 1180, 29 Cal.Rptr.3d 379, 113 P.3d 63) in determining the reprehensibility of a defendant's conduct, the court should add *additional* factors not approved by any precedent and rejected by this court in *Buell-Wilson I* as being inappropriate considerations.

In doing so, Ford forfeited the right to contend on appeal the court erred in failing to instruct the jury under its Special Jury Instruction No. 21. (*Boeken*, *supra*, 127 Cal.App.4th 1640, 26 Cal.Rptr.3d 638.) In *Boeken*, the Second District Court of Appeal rejected defendant *Philip Morris*'s contention, raised for the first time on appeal, that the jury should have been given an instruction based on *State Farm* because Supreme Court precedent already established that defendants could not be punished for extraterritorial conduct: "... *Philip Morris* argues that the trial court

should have instructed the jury using language similar to that from *State Farm* 'that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.' *Philip Morris* forfeited this issue by failing to request such an instruction from the trial court. *State Farm* was not the first case enunciating this concept. It was first addressed in *BMW*, where the Court stated that 'a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.' [Citation.] Thus, *BMW* provided sufficient authority to enable *Philip Morris* to draft and request an appropriate instruction. The trial court was not required to draft it for *Philip Morris*." (*Boeken*, *supra*, at p. 1694, fn. 27, 26 Cal.Rptr.3d 638.)

Indeed, in a recent Ninth Circuit case, *White v. Ford Motor Co.* (9th Cir.2007) 500 F.3d 963 (*White*), it was noted that trial counsel for Ford in 2004 (before the trial in the instant matter) requested the court instruct the jury on third party harm, but at the same time acknowledged third party harm could be considered in considering reprehensibility: "Concerned that the jury would punish Ford for the harm suffered by other ... victims, ... Ford ... requested an instruction that would prevent the jury from punishing '[Ford] in this case not just for the harm to these plaintiffs, but for harm to other plaintiffs, whether in state or out of state.' *Ford conceded that evidence of harm to other people could be considered by the jury in assessing reprehensibility*, but argued that the jury could punish only 'for the harm to this plaintiff.' The district court refused such an instruction, deciding

that it was not required by existing precedent." (*Id.* at p. 972, italics added.)

Here, counsel for Ford was aware during the 2004 trial that United States Supreme Court and California precedent provided that, in determining the reprehensibility of a defendant's conduct, juries could consider (1) whether the defendant's conduct demonstrated an indifference or reckless disregard for the health or safety of others; and (2) whether a defendant's actions were repeated or an isolated act that only impacted the plaintiff, both factors relating to third party harm. (*State Farm*, *supra*, 538 U.S. at p. 419, 123 S.Ct. 1513; *Simon*, *supra*, 35 Cal.4th at p. 1180, 29 Cal.Rptr.3d 379, 113 P.3d 63.) As discussed, *ante*, Ford argued *against* giving such an instruction to the jury and instead proposed a jury instruction that would have *forbidden* the jury from considering these factors.

The *Philip Morris* decision holds "the States have some flexibility to determine what kind of procedures they will implement" to instruct the jury with regard to punitive damages. (*Philip Morris*, *supra*, 549 U.S. at p. ___, 127 S.Ct. at p. 1065, 166 L.Ed.2d at p. 951.) Further, the Supreme Court held a jury instruction on third party harm need only be given where the risk of prejudice to the defendant is "significant" and only "upon request." (*Ibid.*) Thus, *Philip Morris* (and other controlling United States Supreme Court precedent) comports with California law providing that proper instructions must be presented by counsel, and misleading or inaccurate instructions may be rejected.

(2) *Ford's Special Jury Instruction No. 19*

Further compounding the matter, Ford submitted, and the court accepted, Special Jury

Instruction No. 19, based on *State Farm*'s holding that limited the jury's consideration of defendant's conduct to that which occurred in the state where the action is pending. However, that jury instruction also told the jury they *could* consider the impact of Ford's actions on California citizens other than the plaintiffs, i.e., that the jury could consider harm to third parties, as long as it was limited to California: "In determining the amount of punitive damages, if any, that is necessary to achieve the proper level of punishment and deterrence, you may consider only Ford's conduct, if any, that has had an adverse impact *on the citizens of California*." (Italics added.) Further, as we discuss, *post*, the argument of counsel regarding harm to third parties in closing argument on the punitive damages phase was limited to harm to persons within California. It was thus within the parameters of Ford's own instruction. Thus, to the extent the jury was allowed to consider third party harm in the punitive damages phase of the trial, Ford invited the error. (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 16531655, 57 Cal.Rptr.2d 525 [appellants cannot complain on appeal about jury instructions they requested].)

(3) *Ford's belated objection to plaintiffs' oral argument*

The fact Ford belatedly objected to plaintiffs' counsel's oral argument also does not aid Ford's position. First, as discussed in detail, *ante*, the third party harm instruction Ford proposed was an incorrect statement of law that conflicted with *State Farm* and *Philip Morris*.

Second, plaintiffs' arguments were within Special Jury Instruction No. 19, submitted by Ford, that

stated the jury *could* consider the impact of Ford's conduct on persons other than the plaintiffs inside California. In plaintiffs' counsel's closing arguments at the punitive damages phase, he made it clear he was "focusing in this argument just on this state."

Third, Ford's objection came too late, after the jury had begun deliberations. (*Horn v. Atchison, T & S.F. Ry. Co.* (1964) 61 Cal.2d 602, 610, 39 Cal.Rptr. 721, 394 P.2d 561 [objections forfeited because "[a]t no time did counsel for defendant ... interrupt plaintiff's counsel's opening or closing arguments to make objections as to the claimed instances of misconduct. Instead he elected to sit by while the improprieties accumulated until the conclusion of the closing argument, and then move for a mistrial"]; *Grimshaw*, *supra*, 119 Cal.App.3d at pp. 797798, 174 Cal.Rptr. 348 [Ford waived challenge to alleged misconduct of counsel; motion for mistrial too late to raise issue]; *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 302303, 85 Cal.Rptr. 444, 466 P.2d 996 [failure to assert contemporaneous objection to improper argument of counsel concerning defendant's "wealth" waived right to seek mistrial].)

(4) *Ford's failure to request limiting instruction at trial*

As will be discussed in detail, *post*, Ford asserts it was error and a violation of due process for the court to admit evidence concerning the Bronco II's and the Explorer's propensity to roll over, as that evidence, and argument relating to it, allowed the jury to punish Ford for harm to third parties. Ford asserts it properly preserved this issue by filing a motion in limine to exclude evidence or argument of third party harm. However, that motion in limine sought in part

to exclude evidence of (1) Ford's actions outside California; and (2) evidence of Ford's financial condition or net worth.

Further, although Ford's motion in limine made passing reference to the fact that "plaintiffs should not be permitted to urge the jury to vindicate the rights of other persons not before the court" or to "punish Ford for any conduct that goes beyond the specific harm alleged to the plaintiffs in this case," counsel conceded at oral argument before this court that some of the Bronco II and Explorer evidence was admissible and for certain purposes. As we explained in *Buell-Wilson I*, and discuss in detail, post, such evidence was admissible for purposes not impacted by *Philip Morris*. However, Ford never requested the court instruct the jury regarding the purposes for which that evidence could or could not be considered. This failure also resulted in a forfeiture of the right to raise the third party harm issue on appeal: " 'When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly.' [Citation.] Thus, although a court should give a limiting instruction on request, it has no sua sponte duty to give one." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051, 16 Cal.Rptr.3d 880, 94 P.3d 1080, second italics added.)

(5) *Ford's failure to raise instructional error on appeal*

It is undisputed Ford did not appeal to *this* court on the basis the jury had been incorrectly instructed or there was improper closing argument by counsel. It is further undisputed Ford did not raise

instructional error or assert improper argument by counsel in its petition for rehearing or petition for review to the California Supreme Court. Indeed, at oral argument before this court, counsel for Ford acknowledged it never asserted instructional error as a basis for reversing the judgment on the first appeal.[14]

Ford has forfeited the right to raise instructional error here in response to *Philip Morris*. The United

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[14] In its petition for rehearing Ford asserts that our opinion erroneously states that counsel conceded at oral argument that Ford failed to raise instructional error in the first appeal. However, a review of the oral argument record shows otherwise. First, at 9:20 a.m., the following exchange took place:

> "[The Court:] Are you saying there was instructional error at the trial?
>
> "[Ford's Counsel:] Yes.
>
> "[The Court:] Did you raise it in your first appeal?
>
> "[Ford's Counsel:] In our first appeal, Your Honor, we focused on the third party harm issue, but we focused on the Bronco II-
>
> "[The Court:] So the answer is, 'No'?
>
> "[Ford's Counsel:] The answer is, 'No,' we did not specifically raise the instructional issue in our first appeal...."
>
> In rebuttal, the following exchange took place, beginning at 9:51 a.m.:
>
> "[The Court:] But did you complain about instructional error in your appeal?
>
> "[Ford's Counsel:] We, we did not complain about it in our, in the first go-round."

States Supreme Court lacks jurisdiction over federal questions "not pressed or passed upon in the state courts." (Stern, *supra*, § 3.16, p. 171.) Ford was required not only to raise the issue in the trial court, but to pursue it "on appeal to higher state courts ... in the manner and with the degree of specificity required by the state rules of practice." (Stern, *supra*, at § 3.18(b), p. 179, citing *Beck v. Washington* (1962) 369 U.S. 541, 549-554, 82 S.Ct. 955, 8 L.Ed.2d 98.) " 'Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.' " (*Wolfe v. North Carolina* (1960) 364 U.S. 177, 195, 80 S.Ct. 1482, 4 L.Ed.2d 1650.)

Indeed, Ford understood at the time of its first appeal that juries could not punish defendants for harm to third parties. In its opening brief in the original appeal Ford argued that "plaintiffs' invocation of the Bronco II as a basis for punitive damages, in and of itself, is unconstitutional and grounds for reversal, because due process forbids imposing punitive damages against a defendant for conduct other than the specific conduct that harmed the plaintiffs before the court." However, Ford was attacking plaintiffs' closing argument during the liability phase of the trial, argument that, as we explain, *post*, was entirely proper. Moreover, that statement was in a section of Ford's brief asserting that the admission of the Bronco II evidence constituted a grounds for reversal of the judgment, not in Ford's argument that the punitive damages

award should be reversed. This passing reference in a separate portion of Ford's brief was insufficient to raise a constitutional question on the punitive damages award. (*Bd. of Dirs. of Rotary Int'l v. Rotary Club* (1987) 481 U.S. 537, 550, fn. 9, 107 S.Ct. 1940, 95 L.Ed.2d 474 ["casual reference" in appellate brief in unrelated argument "is insufficient to inform a state court that it has been presented with a claim" subject to Supreme Court jurisdiction]; *Adams v. Robertson* (1997) 520 U.S. 83, 88-89 & fn. 3, 117 S.Ct. 1028, 137 L.Ed.2d 203 [reference to different related argument in appellate brief did not raise federal question presented to Supreme Court].)

Although it understood then that juries could not award punitive damages to punish defendants for harm to third parties, nowhere in the first appeal did Ford assert the jury should have been instructed on third party harm or that plaintiffs' counsel's arguments during the punitive damages phase of the trial was improper. Ford has thus forfeited the right to raise these issues upon remand.

(6) *Recent Ninth Circuit cases*

Ford asserts a recent Ninth Circuit case, *Merrick v. Paul Revere Life Ins. Co.* (9th Cir.2007) 500 F.3d 1007 (*Merrick*), compels the conclusion the court erred by failing to instruct the jury on third party harm "irrespective of the proposed instruction's precise language." This contention is unavailing.

In *Merrick*, the jury awarded $10 million in punitive damages in an insurance bad faith action. The plaintiff's bad faith and punitive damages claims "turned upon linking [the defendants'] handling of [the plaintiff's] claim to a decade of allegedly improper claims handling practices." (*Merrick*, *supra*, 500 F.3d at p. 1015.) In response, the defendants

requested the court instruct the jury as follows: "In deciding whether or in what amount to award punitive damages, you may consider only the specific conduct by Defendants that injured Plaintiff. You may not punish Defendants for conduct or practices that did not affect Plaintiff, even if you believe that such conduct or practices were wrongful or deserving of punishment. The law provides other means to punish wrongdoing unrelated to Plaintiff." (*Ibid.*) The court denied the request and, on appeal, based on the intervening decision in *Philip Morris*, the defendant argued the district court's refusal violated its due process rights. (*Merrick*, *supra*, 500 F.3d at p. 1007.)

In addressing plaintiff's claim the district court properly denied the defendant's proposed instruction, the Ninth Circuit stated plaintiff was "correct that the first sentence of the proposed instruction [was] misleading because it fail[ed] to indicate that the jury may consider harm to others as part of its reprehensibility analysis." (*Merrick*, *supra*, 500 F.3d at p. 1016.) However, based on federal law, the Ninth Circuit then held this error by defendants was not fatal to their appeal because the trial court had a duty to correct the erroneous instruction and give the jury a proper one: "[T]he fact that the proposed instruction was misleading does not alone permit the district judge to summarily refuse to give any instruction on the topic.... Where a proposed instruction is supported by law and *not* adequately covered by other instructions, the court should give a non-misleading instruction that captures the substance of the proposed instruction." (*Id.* at p. 1017, citation omitted.)

However, as discussed in detail, *ante*, California law does not require judges to correct erroneous or misleading instructions. (*Shahinian v. McCormick* (1963) 59 Cal.2d 554, 565-566, 30 Cal.Rptr. 521, 381 P.2d 377, overruled on other grounds in *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 161, 41 Cal.Rptr.3d 299, 131 P.3d 383.) For example, in *Boeken*, *supra*, 127 Cal.App.4th at page 1673, 26 Cal.Rptr.3d 638, the Second District Court of Appeal explicitly rejected the exact federal rule announced in *Merrick*: "[I]nstruction O was incomplete.... [Defendant] argues that the omission was so minor as to require the trial court to modify the instruction. We disagree. 'A trial court has no duty to modify or edit an instruction offered by either side in a civil case. If the instruction is incomplete or erroneous the trial judge may ... properly refuse it.' "

Further, here Ford did not request a legally correct instruction or request the court amend it to properly state the law. Ford *also* argued *against* instructing the jury in a proper manner. Indeed, Ford opposed plaintiff's request the court instruct the jury that, in considering reprehensibility, it could consider third party harm, *i.e.*, whether the conduct was repeated. Finally, unlike the defendant in *Merrick*, Ford did not preserve any issue of instructional error because it failed to raise the issue when it first appealed to this court.

White, *supra*, 500 F.3d 963, another recent Ninth Circuit case that reversed a punitive damages award because of the court's failure to give a third party harm instruction, also does not support Ford's position. As we noted, *ante*, in *White*, counsel for Ford, when requesting an instruction on third party harm, also acknowledged the jury could consider

third party harm in assessing reprehensibility: "Concerned that the jury would punish Ford for the harm suffered by other rollaway victims,[15] counsel for Ford had objected to the district court's proposed jury instructions, and requested an instruction that would prevent the jury from punishing '[Ford] in this case not just for the harm to these plaintiffs, but for harm to other plaintiffs, whether in state or out of state.' *Ford conceded that evidence of harm to other people could be considered by the jury in assessing reprehensibility, but argued that the jury could punish only 'for the harm to this plaintiff.'* The district court refused such an instruction, deciding that it was not required by existing precedent." (*White*, *supra*, 500 F.3d at p. 972, italics added.)

In contrast, in this case Ford refused to acknowledge the jury could consider third party harm in addressing reprehensibility, and in fact proposed an instruction that *barred* the jury from considering this factor and opposed counsel's arguments that the jury should be instructed on third party harm on the issue of reprehensibility. In *White*, trial counsel for Ford did not submit legally incorrect instructions as it did here, or oppose instructions that could have cured that error.

(7) *Revision of CACI instructions after Philip Morris*

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15 The *White* case involved a defect in parking brakes in F series Ford trucks that caused the tragic death of the plaintiffs' three-year-old son when their truck rolled over him in the family's driveway. (*White*, *supra*, 500 F.3d at pp. 966-967.)

Ford asserts that because the Judicial Council of California (Judicial Council) recently revised the CACI instructions on punitive damages in response to *Philip Morris* and declined to add language specifying that juries could consider third party harm in assessing reprehensibility, its instruction was sufficient. We reject this contention.

On May 24, 2007, the Judicial Council's Advisory Committee on Civil Jury Instructions (Advisory Committee) proposed revised CACI instructions in response to *Philip Morris*. (Advisory Com. Rep. (July 24, 2007) pp. 23.)[16] In August 2007 the Judicial Council approved the revisions, which added the following language to CACI Nos. 3940, 3942, 3943, 3945, 3947 and 3949: "Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff]."

Of importance to our analysis, in considering what revisions should be made to the CACI punitive damages instructions in light of *Philip Morris*, the Advisory Committee reviewed comments from the public. (Advisory Com. Rep., *supra*, at pp. 1-2.) The committee noted that "the principal suggestion was to include language that would expressly clarify how harm to nonparties may be considered in determining reprehensibility of the defendant's conduct." (*Id.* at pp. 2-3.) The committee ultimately rejected that suggestion, stating "because the United

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16 Ford has attached a copy of the Advisory Committee report to a September 14, 2007 letter brief. We may properly take judicial notice of that document, and do so. (Evid. Code, § 452.)

States Supreme Court did not approve or suggest any particular language for this purpose, it would be best not to attempt such an addition. *The current instructions permit consideration of a defendant's (1) disregard of the health and safety of others and (2) pattern and practice. The committee believes that this language leaves sufficient room for the plaintiff to present harm to others for the limited purpose of proving reprehensibility.*" (*Id.* at p. 3, italics added.)

These comments do not help, and indeed weaken, Ford's position that its proposed instruction on third party harm should have been given. The comments show the Advisory Committee did not deny the need to instruct juries that they may consider third party harm in determining reprehensibility. Rather, they found the existing instructions *already did so*.[17] One of the CACI instructions the Advisory Committee was speaking of, CACI No. 3945, specifies the factors *State Farm* and *Simon* hold juries are to consider in deciding the reprehensibility of a defendant's conduct, including "[w]hether [*name of defendant*] disregarded the health or safety of others" and "[w]hether [*name of defendant*]'s conduct involved a pattern or practice."[18]

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17 As discussed, *ante*, BAJI No. 14.72.2 was also recently amended to state that juries should consider third party harm in determining reprehensibility, but they could not punish a defendant for that third party harm.

18 CACI No. 3945 provides in part: "If you decide to award punitive damages, you should consider all of the following in determining the amount: [ ] (a) How reprehensible was [*name of defendant*]'s conduct? In deciding how reprehensible [*name of defendant*]'s conduct was, you may

[Footnote continued on next page]

In this case, Ford did not propose an instruction that set forth the factors juries are to consider in determining reprehensibility. Moreover, as discussed, *ante*, plaintiff proposed an instruction that would have listed the factors juries were to consider in determining reprehensibility. Ford *opposed* that instruction, however, and the court refused to instruct the jury with that proposed instruction. Most important, as already discussed in detail, Ford's instruction directly contradicted the amended CACI instructions and *Philip Morris* because it *prohibited* the jury from considering third party harm in determining reprehensibility.

(8) *Impact of GVR order*

Ford asserts the United States Supreme Court's GVR order implies the high court found Ford did not forfeit the right to raise instructional error on appeal. However, GVR orders do not imply any view on the merits of the remanded case and do not necessitate the reversal of the remanded case if the intervening authority is distinguishable or otherwise does not require a change in the original opinion. (*In re Patrick W.* (1980) 104 Cal.App.3d 615, 618, 163 Cal.Rptr. 848; Stern, *supra*, § 5.12(b), p. 319, fn. 94

[Footnote continued from previous page]

consider, among other factors: [ ] 1. Whether the conduct caused physical harm; [ ] 2. Whether [*name of defendant*] disregarded the health or safety of others; [ ] 3. Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/it]; [ ] 4. Whether [*name of defendant*]'s conduct involved a pattern or practice; and [ ] 5. Whether [*name of defendant*] acted with trickery or deceit."

[noting that "in a substantial number of the remanded cases the courts of appeals adhered to the original ruling, and that very few of these judgments were reversed by the Supreme Court"].)

Indeed, despite the GVR order, *Buell-Wilson I* "retains the ordinary precedential value of a published opinion of an intermediate appellate court and it remains the law of the case on all points other than the federal constitutional issue." (*Romo*, *supra*, 113 Cal.App.4th at p. 744, fn. 1, 6 Cal.Rptr.3d 793; *accord*, *Occidental Life Ins. Co. v. State Bd. of Equalization* (1982) 135 Cal.App.3d 845, 848, fn. 1, 185 Cal.Rptr. 779 ["we refer to the [vacated] decision ... for the continuing value of its reasoning in *nonfederal* aspects"]; *DeCamp v. First Kensington Corp.* (1978) 83 Cal.App.3d 268, 279-280, 147 Cal.Rptr. 869; *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465, 470, 122 Cal.Rptr. 61; *Guidi v. Superior Court* (1973) 10 Cal.3d 1, 13, fn. 11, 109 Cal.Rptr. 684, 513 P.2d 908.) The California Supreme Court routinely cites and relies on cases of its own, even when, as it notes, they have been "vacated on other grounds." (See *People v. Griffin* (2004) 33 Cal.4th 536, 598, 15 Cal.Rptr.3d 743, 93 P.3d 344; *People v. Thomas* (1992) 2 Cal.4th 489, 518, 7 Cal.Rptr.2d 199, 828 P.2d 101; *People v. Allison* (1989) 48 Cal.3d 879, 898-899, 258 Cal.Rptr. 208, 771 P.2d 1294.)

Accordingly, we conclude Ford forfeited the right to assert, under *Philip Morris*, that the court erred in failing to instruct the jury that it could not punish Ford for harm to third parties.

(9) *Post-oral argument legal developments*

After oral argument was heard and this matter was submitted, two cases were filed relevant to our

discussion of Ford's forfeiture of the right to raise the issue of whether the court erred in failing to instruct the jury on third party harm.

In *Bullock v. Philip Morris* USA, Inc. (2008) 159 Cal.App.4th 655, 71 Cal.Rptr.3d 775 (Bullock), the Second District Court of Appeal concluded that under *Philip Morris*, *supra*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940, the trial court erred in refusing to instruct the jury, " 'You are not to impose punishment for harms suffered by persons other than the plaintiff before you.' " (*Bullock*, *supra*, at p. 693, 71 Cal.Rptr.3d 775.) In doing so, the court concluded *Philip Morris*'s proposed instruction was not incomplete or misleading even though it did not include the qualification that evidence of harm to others *could* be considered to determine the reprehensibility of the conduct that harmed the plaintiff. The Court of Appeal reached this conclusion by first noting that consideration of harm to others to determine the reprehensibility of a defendant's conduct to a plaintiff for the purpose of determining the amount of punitive damages "is not imposing punishment for harm caused to others." (*Id.* at p. 694, 71 Cal.Rptr.3d 775.) The Court of Appeal further concluded that defendant *Philip Morris* "had no duty to qualify its proposed instruction in order to encompass a rule of law favorable to Bullock concerning the permissible use of evidence of harm caused to others," in the absence of a request from the plaintiff of such limiting language. (*Ibid.*) The court also held that a remittitur was not appropriate under the circumstances and ordered a new trial on punitive damages. (Id. at pp. 694, 695 & fn. 21, 71 Cal.Rptr.3d 775).

Bullock, *supra*, 159 Cal.App.4th 655, 71 Cal.Rptr.3d 775, is distinguishable from our case because, here, Ford's proposed Special Jury Instruction No. 21 did not merely state that the jury could not punish Ford for harm suffered by third parties. Rather, as discussed, *ante*, that instruction prohibited the jury from considering third party harm for *any* purpose in setting the amount of punitive damages. Moreover, in our case we do not have a situation where Ford proposed an instruction that correctly stated the law, and the plaintiffs failed to request a qualification that would have made the instruction more favorable to their position. As discussed in more detail, *ante*, plaintiffs did request that the court instruct the jury for what purposes it was permissible for it to consider third party harm, and the court, at Ford's urging, rejected that instruction. Finally, we have also concluded here that Ford has forfeited the right to raise the contention that the court committed instructional error because it failed to raise this issue on its original appeal.

The second recent case relevant to our discussion is *Williams v. Philip Morris*, Inc. (2008) 344 Or. 45, 176 P.3d 1255 (*Williams II*), wherein the Oregon Supreme Court, on remand from the United States Supreme Court's decision in *Philip Morris*, held that the trial court did not err in refusing to give an instruction that properly told the jury that it could not punish the defendant for harm to third parties, but could consider third party harm in considering the defendant's reprehensibility. (*Philip Morris*, *supra*, 549 U.S. at p. __, 127 S.Ct. at p. 1061, 166 L.Ed.2d at p. 947.) The Oregon Supreme Court reached this conclusion because the instruction misstated Oregon law in two respects unrelated to

third party harm. The *Willams II* court held that a jury instruction need not be given unless it is " 'clear and correct in all respects, both in form and in substance, and ... altogether free from error.' " (*Williams II*, *supra*, 176 P.3d at p. 56.) "It is not enough ... to offer a proposed instruction that is correct in part and erroneous in part, leaving the trial court to solve the problem for itself." (*Id.* at p. 56.)

The *Williams II* decision provides further support for our conclusion here that Ford forfeited the right to assert the court erred in refusing to give Special Jury Instruction No. 21. We have concluded, *ante*, as the Oregon Supreme Court did, that because Ford's instruction was incomplete, misleading, and affirmatively *misstated* the law on punitive damages, the court did not have an obligation to give the instruction as written, nor to correct it for Ford.

4. *Prejudice*

We also conclude, based on our previous reduction of the punitive damages award and the evidence and argument of counsel during the punitive damages phase of the trial, that there was no "significant risk" the jury punished Ford for harm to third parties. Therefore, even assuming the court erred in failing properly to instruct the jury on third party harm, *Philip Morris* does not necessitate a reversal of the punitive damages award.

a. *Standard of review*

Under article 6, section 13 of the California Constitution, "[a] judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the

error complained of has resulted in a miscarriage of justice.' " (*Soule*, *supra*, 8 Cal.4th at p. 580, 34 Cal.Rptr.2d 607, 882 P.2d 298.) Instructional error is deemed harmless unless it is "reasonably probable defendant would have obtained a more favorable result" if the error had been corrected. (*Id.* at p. 570, 34 Cal.Rptr.2d 607, 882 P.2d 298.)

b. *Prior reduction of punitive award*

As we have explained, *ante*, in reviewing the amount of a punitive damages award for prejudice, for purposes of our review the relevant amount is not the amount initially awarded by the jury, but rather the amount by which the trial court, and this court, ordered the judgment reduced. (See *Hasson*, *supra*, 32 Cal.3d at p. 419, 185 Cal.Rptr. 654, 650 P.2d 1171.)

In deciding whether an award of punitive damages is constitutionally excessive, we review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct. "This '[e]xacting appellate review' is intended to ensure punitive damages are the product of the ' " 'application of law, rather than a decisionmaker's caprice.' " ' " (*Simon*, *supra*, 35 Cal.4th at p. 1172, 29 Cal.Rptr.3d 379, 113 P.3d 63.)

Moreover, there is a distinction to be drawn between what is traditionally referred to as a "remittitur," which we applied to the emotional distress damages, and a reduction of an excessive punitive damages award: "A constitutionally reduced verdict ... is really not a remittitur at all. A remittitur is a substitution of the court's judgment

for that of the jury regarding the appropriate award of damages. The court orders a remittitur when it believes the jury's award is *unreasonable* on the facts. A constitutional reduction, on the other hand, is a determination that the law does not permit the award. Unlike a remittitur, which is discretionary with the court ..., a court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause." (*Johansen v. Combustion Engineering, Inc.* (11th Cir.1999) 170 F.3d 1320, 13311332, fn. & citation omitted.)

"Thus, in deciding the constitutional maximum [for a punitive damage award], a court does not decide whether the verdict is unreasonable based on the facts; rather, it examines the punitive damages award to determine whether it is constitutionally excessive and, if so, may adjust it to the maximum amount permitted by the Constitution." (*Gober, supra*, 137 Cal.App.4th at p. 214, 40 Cal.Rptr.3d 92.) This is so because " 'the level of punitive damages is not really a "fact" "tried" by the jury.' " (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 437, 121 S.Ct. 1678, 149 L.Ed.2d 674.) Thus, "the jury's award of punitive damages does not constitute a finding of 'fact' " to which an appellate court must defer. (*Ibid.*)

As we discussed in *Buell-Wilson I* and reiterate in this opinion, we remitted the noneconomic damages to an amount supported by the evidence and omitted any punitive element.

Moreover, in deciding the constitutionally permissible amount of punitive damages in our original opinion, we conducted a de novo review of the punitive damages award, applying the factors

dictated by *State Farm* and other applicable precedent. Our *Buell-Wilson I* opinion, however, did not consider or justify the amount to which we reduced the punitive damages award by reference to potential harm to others. The only evidence we cited in our discussion of punitive damages related to harm to third parties was in our discussion of the reprehensibility of Ford's conduct. (*Buell-Wilson I*, *supra*, 141 Cal.App.4th at pp. 568-569, 46 Cal.Rptr.3d 147.) Thus, in conducting our independent review and arriving at a constitutionally permissible amount of punitive damages, we satisfied the due process concerns of Ford.

For example, in *Romo*, *supra*, 113 Cal.App.4th 738, 6 Cal.Rptr.3d 793, disapproved on other grounds in *Johnson*, *supra*, 35 Cal.4th at pages 1205-1207, 1213, 29 Cal.Rptr.3d 401, 113 P.3d 82, the Court of Appeal was reconsidering a punitive damages award in light of *State Farm* after the United States Supreme Court vacated the Court of Appeal's original decision. (*Romo*, *supra*, at p. 743, 6 Cal.Rptr.3d 793.) The Court of Appeal concluded the jury instructions given by the trial court violated *State Farm* and prejudiced Ford. (*Romo*, *supra*, at pp. 753-754, 6 Cal.Rptr.3d 793.) However, rather than remanding the matter for a new trial on punitive damages, the Court of Appeal reduced the award to an amount that was not constitutionally excessive: "While the underlying facts supporting a punitive damages award are for the jury to decide, the amount of punitive damages must be independently reviewed on appeal. [Citation.] In conducting such review, we remove any prejudice accruing to the defendant as a result of misinstruction concerning the amount of such award;

we do so by modifying the judgment to reflect a level of punitive damages below which we believe no properly instructed jury was reasonably likely to go. [Citation.] Accordingly, our reduction of the award satisfies the due process interests of defendant." (*Id.* at p. 754, 6 Cal.Rptr.3d 793.)

In determining as a matter of law the constitutionally appropriate amount of punitive damages when this matter was first before us, we also necessarily reduced the award to comport both with due process principles, including the notion Ford could not be punished for harm to third parties, and the factors to be considered under *State Farm*. We made an independent determination under these factors that Ford's conduct justified an award of punitive damages in an amount equal to a two-to-one ratio to the compensatory damages, which we had already reduced to eliminate any potential punitive effect. We did not consider harm to third parties (except when assessing the reprehensibility of Ford's conduct) when making that award.

There is no basis for a further reduction in the award or a new trial on punitive damages, as the reduced amount of the award comports with the holding of *Philip Morris*.

c. *Evidence and arguments at trial*

Ford has also failed to demonstrate that evidence or argument at trial prejudiced it in a manner that would require, under *Philip Morris*, a further reduction in the punitive damages award or a new trial on punitive damages.

(1) *Evidence admitted at trial*

Ford first asserts that admission of evidence at the liability and compensatory damages phase of the

trial regarding the Bronco II's and Explorer's propensity to roll over was itself a due process violation under *Philip Morris*. However, as we explained in our original decision, and again in this opinion, *ante*, that evidence was properly admitted as relevant to issues related to proof the product was defective in the plaintiffs' case-in-chief. The Bronco II and Explorer evidence was relevant during the liability phase of the trial to show, under California law, that Ford had notice of the defective product. (*Hasson*, *supra*, 32 Cal.3d at p. 404, 185 Cal.Rptr. 654, 650 P.2d 1171.) Further, as stated, *ante*, that evidence was admissible to show Ford acted with malice on the issue of whether the plaintiffs were *entitled* to an award of punitive damages. "Marketing a product that is known to be defective and dangerous to consumers supports an inference of malice for purposes of punitive damages." (*Karlsson*, *supra*, 140 Cal.App.4th at p. 1230, 45 Cal.Rptr.3d 265; *Grimshaw*, *supra*, 119 Cal.App.3d at p. 814, 174 Cal.Rptr. 348; *Taylor*, *supra*, 24 Cal.3d at p. 895, 157 Cal.Rptr. 693, 598 P.2d 854 [malice may be shown by fact the defendant had acted with a "conscious disregard of the safety of others"].)

As our Supreme Court explained in *Johnson*, United States Supreme Court precedent "makes clear that due process does not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's illegal or wrongful conduct towards others that was similar to the tortious conduct that injured the plaintiff or plaintiffs. [A] civil defendant's recidivism remains pertinent to an assessment of culpability." (*Johnson*, *supra*, 35 Cal.4th at p. 1204, 29 Cal.Rptr.3d 401, 113 P.3d 82.) " ' "[P]unitive damages may properly be imposed to further a State's legitimate interests in

punishing unlawful conduct and deterring its repetition" ' [citation] and [*State Farm*] did not limit the concept to punishment and deterrence purely on behalf of the plaintiff." (*Id.* at p. 1206, 29 Cal.Rptr.3d 401, 113 P.3d 82.)

Nowhere does *Philip Morris* suggest due process requires trial courts to exclude otherwise relevant, admissible evidence in the process of determining liability or whether an award of punitive damages is warranted. "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." (*State Farm, supra*, 538 U.S. at p. 422, 123 S.Ct. 1513.)

Rather, *Philip Morris* held that in appropriate cases courts will need to ensure, by appropriate jury instructions and limitations on argument by counsel, that evidence of third party harm is not used to *punish* defendants when determining *the amount of punitive damages to award*.

(2) *Closing arguments at liability phase*

Ford also attacks statements made by plaintiffs' counsel in closing arguments that it claims were in violation of *Philip Morris*. This contention is unavailing.

In the first phase of the bifurcated trial, the jury was deciding liability, compensatory damages, and whether plaintiffs were *entitled* to punitive damages. Ford points to closing arguments counsel for plaintiffs made there that allegedly invited the jury to punish Ford for harm to third parties. Specifically,

Ford points to the following arguments made by plaintiffs' counsel:

> "They go ahead and release the Bronco II in 1983 ... knowing it will roll over and kill or catastrophically injure many people, which it has. [¶] *Fraud, oppression, malice, these are issues that relate to one question that has [sic] clear and convincing. T[his is t]he last question on the verdict form, [and] it is the most importan[t] [answer] you will give in this case....* [¶] ... This is the report to the Consumers Union. Bronco II. [The following] [q]uotation [appears] in the document[:] 'We are in deep trouble regarding our rollover rates. Our data are not terribly favorable. Our rollover rate is three times higher than the Chevy S10 Blazer. We think, however, we have clouded their minds.' Ron Campbell testifies that Ford is aware by 1989 that many people are killed or seriously injured in [Bronco II] rollovers. Right in this time period, and they are going out to market with this new launch [*i.e.*, the Explorer] with Job 1 with the engineers telling them [that it had] the same problems. *Conscious, deliberate, oppressive, fraudulent conduct.* [¶] ... [¶] Hundreds of Explorer rollover cases. [Ford expert] Tandy, involved at least in dozens of on-road untripped Explorer rollover cases. And I cross-examined [Ford expert] Germane, from other cases.... Cases that these guys are working on together. *Ford*

> *management's willingness to accept this risk from the Bronco II through the [1997 model Explorer] is the definition precisely of fraud, malice and oppression.*" (Italics added.)

Counsel's argument in the first phase of the trial did not ask the jury to punish Ford for harm to third parties. Rather, as discussed, *ante*, this argument properly referred to facts supporting entitlement to an award of punitive damages, i.e., whether Ford's actions demonstrated malice, fraud and/or oppression. (See *Karlsson*, *supra*, 140 Cal.App.4th at p. 1230, 45 Cal.Rptr.3d 265; *Grimshaw*, *supra*, 119 Cal.App.3d at p. 814, 174 Cal.Rptr. 348; *Taylor*, *supra*, 24 Cal.3d at p. 895, 157 Cal.Rptr. 693, 598 P.2d 854.) *Philip Morris* does not stand for the proposition that juries cannot consider the repeated nature of a defendant's conduct in determining whether to award punitive damages, and the factors used to reach that conclusion. Rather, it only held that in determining the *amount* to award, juries could not *punish* defendants for harm caused to third parties.

(3) *Closing arguments at punitive damages stage*

The statements made by plaintiffs' counsel in the bifurcated punitive damages closing argument also did not create a "significant risk" the jury would punish Ford for harm to third parties. Ford focuses on the following arguments by counsel:

> "So you understand what the consequences and what the risk factor was that they voluntarily, at the highest level of this company, chose to put people in wheelchairs, brain damaged or death, in a defectively

designed product, their decision to put this vehicle out to the market in California. *And I am focusing in this argument just on our state.* And the effects it has on the people driving these vehicles out there on the highway, not knowing what they are in for if they should do a simple avoidance maneuver. That is the ramification in California, without fixing its known stability problems. *That was callous, that was willful disregard.* Did they do the test? No. The test drivers are out on the roads of California. *Willful disregard of the health and safety of [Mrs. Wilson] and those like her. Was this a single isolated incident? No. You have heard of others in California. Just a few we were allowed to present. [¶] History repeated itself. They had had the same problem before. The same issues. Did they learn? Did they care? Did they really care?* [¶] [T]housands of these vehicles were manufactured and sold in their defective condition and they are on our highways in California. And every time we look at one of those vehicles, we hope and pray there is no [accident] avoidance maneuver necessary. [¶] ... [¶] *[R]eprehensibility of the conduct I submit to you, here in California, the unlawful conduct taking place in this state that should bear the weight of your discussion and consideration.* [¶] ... [¶] This is not only ... a case involving one family here in California, but ... they

> marketed to specifically, the soccer moms, the women with babies, the toddler seats, the families." (Italics added.)

Based on our review of the record, plaintiffs' counsel was not asking the jury to punish Ford for harm done to third parties. Rather, counsel was discussing the repeated nature of Ford's actions in arguing the *reprehensibility* of Ford's conduct. That argument was entirely proper and did not create a "significant risk" the jury would punish Ford for injuries to third parties: "California has long endorsed the use of punitive damages to deter continuation or imitation of a corporation's course of wrongful conduct, and hence allowed consideration of that conduct's scale and profitability in determining the size of the award that will vindicate the state's legitimate interests." (*Johnson*, *supra*, 35 Cal.4th at p. 1207, 29 Cal.Rptr.3d 401, 113 P.3d 82.) "Nothing [*State Farm* or *Philip Morris* have] said about due process review requires that California juries and courts ignore evidence of corporate polices and practices and evaluate the defendant's harm to the plaintiff in isolation." (*Ibid.*)

Moreover, as discussed, *ante*, counsel's argument was within the parameters of the special jury instruction *submitted by Ford* based on the holding in *State Farm* that juries could not punish defendants for conduct outside the state in which the action was pending. That instruction informed the jury it could consider harm to "the citizens of California." Plaintiffs' counsel informed the jury, when discussing the impact of Ford's actions on third parties, that it was limited to considering Ford's conduct with regard to the citizens of California.

Thus, plaintiff's argument was within the bounds of an instruction Ford itself drafted and proposed to the court. Ford cannot complain it was prejudiced by argument based on one of its own instructions.

DISPOSITION

The judgment is affirmed in all respects except as to the award of noneconomic damages to Mrs. Wilson and punitive damages to the Wilsons. The award of punitive damages to the Wilsons is reduced to $55 million. The award of noneconomic damages to Mrs. Wilson is reversed and remanded for retrial on the issue of the amount of noneconomic damages, unless Mrs. Wilson shall, within 30 days from the date this opinion is filed, file with the clerk of this court and serve upon Ford Mrs. Wilson's written consent to a reduction of her noneconomic damages award to $18 million, in which event the judgment shall be modified to award Mrs. Wilson noneconomic damages in that amount, which will result in a total reduced award to the Wilsons of $82,606,004 ($4,606,004 in economic damages + $18 million in noneconomic damages + $5 million in loss of consortium + $55 million in punitive damages), and in which event the judgment will be affirmed in its entirety, as modified. (Cal. Rules of Court, rule 8.264(d).) The parties shall bear their own costs on appeal.

WE CONCUR: McCONNELL, P.J., and IRION, J.

APPENDIX B

Supreme Court of California
BUELL-WILSON (Benetta)
v.
FORD MOTOR COMPANY.
No. S163102.

April 22, 2009.

Prior Report: Cal.App., 73 Cal.Rptr.3d 277.

Dismissed and remanded to Court of Appeal, Fourth Appellate District, Division One.

The United States Supreme Court having dismissed the writ of certiorari in *Philip Morris USA, Inc. v. Williams*, --- U.S. ----, 129 S.Ct. 1436, 173 L.Ed.2d 346 (2009) on March 31, 2009, plaintiffs' motion to dismiss review in this matter is granted.

CORRIGAN, J., was absent and did not participate.

GEORGE, C.J., KENNARD, BAXTER, WERDEGAR, and MORENO, JJ., concur.

APPENDIX C

BENETTA BUELL-WILSON et al.,
Plaintiffs and Respondents,
v.
FORD MOTOR COMPANY et al.,
Defendants and Appellants.

D045154, D045579

COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT,
DIVISION ONE

141 Cal. App. 4th 525;
46 Cal. Rptr. 3d 147;
2006 Cal. App. LEXIS 1089;
2006 Cal. Daily Op. Service 6512;
2006 Daily Journal DAR 9367

July 19, 2006, Filed

COUNSEL: Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., William E. Thomson, Eileen M. Ahern, Theodore B. Olson and Paul DeCamp for Defendants and Appellants.

Kirkland & Ellis, C. Robert Boldt, Christopher Landau, Erin Morrow; National Chamber Litigation Center, Robin S. Conrad and Amar D. Sarwal for The Chamber of Commerce of the United States of America as Amicus Curiae on behalf of Defendants and Appellants.

Mayer, Brown, Rowe & Maw and Donald M. Falk for The Product Liability Advisory Council, Inc., as

Amicus Curiae on behalf of Defendants and Appellants.

O'Melveny & Myers, Brian D. Boyle, Matthew M. Shors, Charles E. Borden and Arthur W. S. Duff for The Alliance of Automobile Manufacturers as Amicus Curiae on behalf of Defendants and Appellants.

Howard, Rice, Nemerovski, Canady, Falk & Rabkin, Jerome B. Falk, Jr., Steven L. Mayer, Keith D. Kessler; Hancock, Rothert & Bunshoft, Paul D. Nelson, Paul J. Killion, Jacqueline G. Elliopulos, Leslie Kurshan, Michael J. Dickman; Schoville & Arnell, Dennis A. Schoville, Louis G. Arnell and James S. Iagmin for Plaintiffs and Respondents.

JUDGES:
Nares, J., with McConnell, P. J., and Irion, J., concurring.

OPINION BY: Nares

OPINION: NARES, J.—Benetta Buell-Wilson (Mrs. Wilson) brought this action against Ford Motor Company (Ford) and Drew Ford (Drew)[1] as a result of the rollover and roof crush of her Ford Explorer (Explorer) that left her a paraplegic. Mrs. Wilson's husband Barry Wilson (Mr. Wilson) brought a claim for loss of consortium against Ford and Drew. A jury found in favor of Mrs. Wilson and Mr. Wilson (together the Wilsons), finding that (1) the Explorer

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[1] Ford Motor Company refers to itself and Drew Ford collectively as "Ford," except where necessary to distinguish between the two. Accordingly, we do the same in this opinion.

was defectively unstable; (2) the Explorer was not crashworthy due to a defect in the roof; (3) Drew failed to warn the Wilsons that the Explorer was defectively unstable; and (4) Ford and Drew failed to warn the Wilsons of the danger posed by the defect in the roof. The jury awarded Mrs. Wilson $109,606,004 in damages for her injuries, consisting of $4,606,004 in economic damages and $105 million in noneconomic damages, and awarded Mr. Wilson $13 million for his loss of consortium. The jury also found that Ford acted with "oppression, fraud or malice" and awarded the Wilsons $246 million in punitive damages. The court later reduced Mrs. Wilson's total compensatory damages award to $70 million, resulting in an award of $4,606,004 in economic damages and $65,393,996 in noneconomic damages. The court reduced Mr. Wilson's loss of consortium damages to $5 million. The court reduced the punitive damages award to $75 million, a one-to-one ratio to the Wilsons' total reduced award of compensatory damages.

On appeal Ford asserts (1) it is entitled to a new trial because the court erroneously admitted evidence about stability problems with a predecessor vehicle, the Ford Bronco II (Bronco II), and erroneously excluded evidence of the Explorer's "real-world" safety record and comparative data; (2) the noneconomic portion of the compensatory damages award was excessive and an unconstitutional violation of Ford's due process rights; (3) punitive damages were improperly awarded because (a) at most the Wilsons proved that "reasonable people could disagree regarding" the design decisions Ford made, and (b) California's punitive damages law is unconstitutionally vague as applied; and (4) the punitive damages award was excessive and the

product of improper considerations. We granted permission to The Chamber of Commerce of the United States of America (the Chamber), The Alliance of Automobile Manufacturers (AAM) and The Product Liability Advisory Council, Inc. (PLAC), to file amicus curiae briefs to support Ford's contentions on appeal.[2]

We hold that (1) the award of noneconomic damages to Mrs. Wilson, as reduced by the trial court, is excessive under California law, is the product of "passion or prejudice," and must be reduced to $18 million; (2) the reduced award for loss of consortium in the amount of $5 million is reasonable and is affirmed; and (3) the award of punitive damages is excessive, violates federal due process limitations, and must be reduced to $55 million, a ratio of approximately two to one to the total compensatory damage award, after our reduction, of $27,606,004 ($4,606,004 in economic damages + $18 million in noneconomic damages + $5 million for loss of consortium). We issue a remittitur conditioning affirmance of the judgment on the Wilsons' agreement to those reductions. Thus, if the Wilsons accept the remittitur, the total judgment will be reduced to $82,606,004 ($4,606,004 in economic damages + $18 million in noneconomic damages + $5 million in loss of consortium + $55 million in punitive damages). We reject the

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[2] Ford separately appealed the underlying judgment and the court's rulings on posttrial motions. On January 26, 2005, by stipulation of the parties, these two appeals were ordered consolidated.

remainder of the arguments made by Ford and amici curiae.[3]

FACTUAL AND PROCEDURAL BACKGROUND

A. The Accident

At around 5:00 p.m. on January 19, 2002, Mrs. Wilson, a married 46-year-old graduate student and mother of two, was driving her 1997 four-door Explorer within the speed limit on Interstate 8 near Alpine, California. The road was dry and sloped slightly downhill.

Suddenly, Mrs. Wilson saw what appeared to be a metal object break loose from a motor home in front of her and bounce directly toward her windshield. As she swerved to avoid the object, the wheels on the passenger side lifted from the road, and the Explorer went out of control. The vehicle fishtailed multiple times across lanes and rolled four and a half times, coming to rest on its roof on the road's shoulder. Ford

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[3] The Wilsons also appealed the judgment, but have voluntarily dismissed their appeal. Following briefing in this matter, the Wilsons filed a motion to strike allegedly false statements made in Ford's reply brief. We ordered the motion considered concurrently with the appeal. We deny the motion to strike, but note that in resolving this appeal we have not considered any statements that are not supported by the record. The Wilsons filed a motion for judicial notice, requesting that we take judicial notice of the legislative history of the 1987 amendment to Civil Code section 3294, as well as portions of the legislative histories for unenacted Assembly Bill No. 2880, unenacted Assembly Bill No. 2582, and pending Senate Bill No. 1429. We grant this unopposed request.

conceded at trial that Mrs. Wilson bore no fault for the accident.

As the Explorer rolled, the roof's pillars and rails crumpled, and the roof crushed down more than 10 inches, causing severe injuries to Mrs. Wilson. Inside the vehicle, she hung upside down from her seatbelt, in "crushing . . . unbelievable pain," gasping for breath and feeling as if her life were fading away. Motorists stopped to assist and struggled to flip the vehicle, and rescue crews cut the roof open to remove her. An ambulance took her from the scene to a life flight helicopter, which flew her to Sharp Memorial Hospital (Sharp) trauma center.

B. Mrs. Wilson's Injuries

1. Physical injuries

The compressive forces from the collapsing roof fractured and severed Mrs. Wilson's spine at the T12 level, where the thoracic and lumbar regions meet. She will never recover sensation or function below the level of that injury. She also suffered facial injuries, fractured ribs, a cut spleen that caused internal bleeding, a fractured leg and torn PCL and ACL ligaments in both knees, causing bilateral knee dislocations.

In addition to the vertebral fractures, the spinal sac was damaged, causing leaking of cerebral spinal fluid, and portions of the spinal cord and nerve root were pulverized. Doctors inserted metal screws and rods into her back to stabilize her upper body. After almost two weeks, she was transferred to Sharp's rehabilitation center, where she spent another two and a half months.

Mrs. Wilson's resulting paraplegia ended her active life and forced her to painfully relearn basic

aspects of daily living, some of which she will never regain. She lives in severe and constant pain that will increase over time. Her accident left her with no sensation from the waist down, except "phantom pain"—a constant burning sensation below her ribs. Above her waist, she suffers constant pain, feels painful pressure on her ribs from the rods in her back, and has intermittent spasms of stabbing pain.

Medication can provide temporary pain relief, but the strong medication needed has serious side effects. It causes her to lose alertness, which makes it impossible to drive. It interferes with her ability to communicate socially. It makes her unsteady in her wheelchair. She also runs the risk of becoming addicted to the medication. There is a constant conflict between efforts to reduce her pain and the debilitating side effects of the medicine itself.

The spinal injury caused a total loss of bladder and bowel control. She must now catheterize herself multiple times daily. Her feces must be manually extracted. In addition to the emotional pain and humiliation from losing control over her bodily functions, she suffers recurring urinary tract infections, which expose her to a potentially fatal kidney disease. Mrs. Wilson is allergic to commonly prescribed medications, including sulfa and penicillin, and her chronic use of antibiotics to fight infections has caused resistance to other drugs.

Mrs. Wilson also suffers severe bruising, which takes months to heal due to diminished circulation in her lower body. Her feet swell and are susceptible to cracking and bleeding. The constant grinding of her shoulder joints from wheeling her wheelchair has caused shoulder problems, which will worsen over time. She suffers disfigurement, with one leg smaller

than the other and large surgical scars across her back.

2. Mental and emotional injuries

Before the accident, Mrs. Wilson was an active, athletic, outdoors woman, with a black belt in martial arts. She often camped and hiked with her family, backpacked with Girl and Boy Scouts, helped with the San Diego Tracking Team, and did projects at Mission Trails Regional Park. She and her husband took dancing lessons, traveled and took walks.

She no longer can engage in any of the active lifestyle she once enjoyed, including swimming, skiing, snowboarding, dancing, backpacking and walking. Mrs. Wilson was finishing her masters degree in education and was about to start a second career as a teacher. These plans also have been indefinitely delayed and it is unclear whether they are now possible.

Mrs. Wilson is unable to visit all the rooms in her home—including her own bedroom—because they are inaccessible to her. She and Mr. Wilson must sleep in their laundry room.

She has changed from a giving, enthusiastic, independent person who took joy in aiding others, to being dependent on others for almost every aspect of her life. Her husband and children are now her caregivers.

C. Mr. Wilson's Loss of Consortium

The injuries to his wife dramatically changed Mr. Wilson's life as well. The Wilsons no longer share the physical relationship they had prior to the accident. Instead, he is now her caregiver and must

assist her with the most personal of care, including showering and catheterizing her. He assists her in transferring in and out of her wheelchair and worries that she may fall if she tries to transfer on her own. Several times per night, he wakes to turn his wife over in bed so that she will not get bedsores.

Mr. Wilson has had to decrease his work schedule as an attorney to assist his wife during the day and accompany her to medical appointments and therapy. He performs the household work that his wife can no longer do. The Wilsons spend most of their time trying to accomplish the mundane chores of daily life. Every day Mr. Wilson shares his wife's constant pain, frustration and anxiety in living with her injuries.

D. The Explorer's Defects

The Wilsons submitted evidence at trial that the accident and resulting injuries were caused by two independent defects in the 1997 Explorer. They established that the Explorer's design was dangerously unstable and prone to rollover due to its overly narrow track width and high center of gravity. They also established that the Explorer's roof was inadequately supported and defectively weak, so that it readily crushed into the passenger compartment when subjected to the forces inherent in a foreseeable rollover.

Ford has not challenged on appeal the sufficiency of the evidence supporting the jury's finding that the

Explorer was defective on either of these grounds.[4] We therefore review the evidence in the light most favorable to the judgment, disregarding contrary evidence submitted by Ford. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053 [68 Cal.Rptr.2d 758, 946 P.2d 427].)

1. Stability defects

Long before the Wilsons purchased their Explorer, Ford's engineers knew that the vehicle's design was unstable and prone to rollover in emergency maneuvers due to its high center of gravity and narrow track width. Ford had known for decades the importance of vehicle stability in emergency maneuvers. It knew that on flat, dry pavement, a car or truck should slide out, rather than roll.

The Explorer was derived from the Bronco II and evidence of its development history was presented to the jury to show them how and why the Explorer's instability defect came to exist. In 1981, two years before the Bronco II's introduction, Ford measured the stability index (SI) of its competitor, the Jeep CJ7, which had a widely reported rollover problem. The SI is the average of front and rear track width, divided by the center of gravity height. The higher the SI rating (*i.e.*, the wider the track and lower the center of gravity), the more stable the vehicle. The

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[4] Ford does assert that the court erroneously admitted evidence that supported the jury's finding on liability and erroneously excluded evidence that supported its defense. However, as is discussed, post, those evidentiary rulings were not an abuse of discretion.

Jeep's SI was 2.04. The Bronco II's SI was less, measuring 1.86. The Bronco II was so unstable it would roll over at only 30 mph on Ford's test track. Ford engineers proposed improving its stability index by widening its track width. Because doing so would have delayed the vehicle's release date and impacted profits, that proposal was rejected by management.

Ford knew that people were being seriously injured in Bronco II rollovers when the Explorer was being developed. In April 1989, a year before the Explorer release date, Ford executives objected to and tried to stop the release of a damaging Consumer Reports article on Bronco II instability.

Regarding these efforts, Jerry L. Sloan of Ford's public affairs office wrote: "We think going in we were in deep trouble regarding our rollover rates . . . . [¶] . . . Our rollover rate is three times higher than the Chevy S-10 Blazer. . . . [T]he [Fatality Analysis Reporting System (FARS)] data put us in a bad light. . . . [¶] . . . [¶] We think, however, that we have clouded their minds . . . ."

Instead of making design improvements in stability for the Explorer, Ford utilized the Bronco II platform. The Explorer had almost exactly the same track width, high engine mount and elevated center of gravity as the Bronco II, which caused the same instability problems. Over half the parts for the four-door and 80 percent for the two-door Explorer were carried over from the Bronco II.

Ford's design engineers repeatedly requested Ford to widen the track width and lower the center of gravity on the Explorer to increase its stability. However, management declined to do so. As acknowledged by Robert Simpson, a program

manager for the development of the Explorer, this was because of "the . . . investment that Ford had sunk into the Explorer," and, as the Wilsons' expert, Dr. David Renfroe, explained, it was also because its "directive was to meet Job 1 [the release date]." Dr. Renfroe also explained that "the engineers were proposing to make [stability index] changes to be consistent with their standards and they were prevented from doing that by the management."

Unable to pass the Consumers Union on-track stability test because the Explorer was rolling over at under 45 miles per hour, Ford resorted to using computer simulations to show the vehicle's safety. Ford claimed the validation data for its computer results did not exist, precluding an expert from determining whether the Explorer actually passed the computer tests. The Explorer did pass the Consumers Union short course test, but that test was designed to measure its handling, not stability.

The Explorer's instability was increased by Ford management's decision to utilize P235 tires that further raised the center of gravity, instead of the P215 tires specified and requested by its engineers to provide greater stability. Based upon his review of Ford internal documents, the Wilsons' expert, Dr. Renfroe, testified that Ford "knew when they made that decision that the vehicle was going to be more unstable and more likely to rollover in an accident avoidance maneuver, and they were . . . willing to accept the risk and take it to court, if necessary." Ford chose larger tires to fill a cosmetic gap between the wheel well and tire in order to present a more "robust" look. Ford's own analysis showed that Explorers equipped with P235 tires would have an SI of 2.08, less than the then-current

1987 Bronco II's SI of 2.15. With the P235 tires, the Explorer failed basic J-turn stability tests.

In 1988 a Firestone engineer, who was working with Ford to analyze the stability effect of different tire sizes on the prototype Explorer, wrote to Ford complaining about the vehicle's inherent instability: "Most importantly, the vehicle still has [two-]wheel lift no matter what tire is on it, 225/70, 215/75 or 205/75. So you're kidding yourself if anyone thinks going back to a base tire of 215/75 is going to solve anything."

Unable to pass stability tests with P235 tires, Ford executives in 1989 considered releasing the four-door Explorer on P225 tires in order to pass the Consumers Union test. Later, if the Explorer passed the test, Ford could release the vehicles with P235 tires, consistent with its marketing plan. In an internal Ford e-mail, this was referred to as a "strawman" that would "assure good performance in the [Consumers Union] Test and minimize any adverse Public Relations risk." Ford's decision to accept the risk of using the P235 tires is shown in an internal e-mail from Ford employee Roger Stornant to Charles *White*, a senior design engineer for the Ford Explorer: "OGC [the office of general counsel] is concerned we will be the only OEM [original equipment manufacturer] with a vehicle that has a significant chance of failing the CU [Consumers Union] test. I believe that management is aware of the potential risk w/P235 tires and has accepted risk."

Instead of using smaller tires, Ford executives decided in February 1989 to underinflate the P235 and P245 tires to 26 pounds per square inch (psi), as opposed to the tire's specification of 35 psi. Explorer

owners were not informed of the need to underinflate the tires, nor were they told they were exposed to the risk of a rollover by complying with the tire's higher inflation specifications.

Ford had an opportunity to improve the Explorer's stability when it changed its suspension design for the 1995-1998 models. But again financial considerations prevailed and, according to a 1990 internal Ford document, Ford decided "not [to] take advantage of the fact that the engine could be lowered with a[n] SLA[5] type suspension. This decision was driven by early implementation and program cost." As a result, the Wilsons' 1997 Explorer was no more stable than the original model or its prototypes. According to the Wilsons' experts, the Explorer's inherent instability caused it to roll in response to Mrs. Wilson's emergency avoidance maneuver, resulting in her injuries.

2. Roof strength defect

As Mrs. Wilson's Explorer rolled, the roof crushed nearly a foot into the passenger compartment. The Wilsons' biomechanical expert, Dr. Anthony Sances, testified that Mrs. Wilson's spinal injury was caused by 1,000 to 2,000 pounds of force crushing down onto her shoulder. Dr. Frank Coufal, her neurosurgeon, confirmed that compressive force caused the spinal injury. The Wilsons' experts testified that a stronger roof would not have crushed and would have prevented Mrs. Wilson's injuries.

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[5] "SLA" is short for "short/long arm" suspension, also known as "double wishbone" suspension.

The Wilsons presented evidence that rollovers are relatively nonviolent events for the occupants when they are properly restrained and there is minimal roof intrusion, and occupants are killed or disabled only when the roof crushes inward.

The Wilsons also presented testimony from their engineering expert Stephen Forrest as to why the Explorer's roof was defectively weak. The evidence showed that Ford could have provided the Explorer with a roof that would not have crushed by using high strength steel, adding reinforcements, eliminating open sections such as the depressed weld groove, eliminating holes and/or using foam filling. Ford had used safer closed section front headers in other vehicles. These modifications would have cost about $20 per vehicle.

3. Ford and Drew's failure to warn the Wilsons of the defects

The Wilsons testified that Ford and Drew did not provide notice of the Explorer's roof crush risk. The Wilsons also submitted evidence that Drew failed to warn them of the instability danger posed by inflating the P235 tires to the tire manufacturer's recommended psi. Drew did not disclose that their Explorer was equipped with larger LT235 tires instead of smaller P225 or P215 tires, nor that underinflation was required for the larger tires. The salesmen at Drew were unaware of an underinflation requirement. Although Ford directed its dealers to use no more than 26 psi in P235 tires, Drew never warned the Wilsons of this fact. Because of this, the Wilsons never knew to instruct attendants to underinflate the tires below the specified 35 psi when the vehicle was serviced.

The Wilsons testified they never would have bought the Explorer if the rollover and tire pressure risks had been disclosed.

E. Trial and Jury Verdict

The jury deliberated for five days before reaching a verdict. It found nine to three that the Explorer had a stability design defect which was a substantial factor in causing the Wilsons' injuries. The jury found 11 to one that there was a crashworthiness design defect in the roof and that this defect was also a substantial factor in their injuries.

As to Drew, the jury found 10 to two that it failed to warn the Wilsons of the stability defect. They found in favor of Ford on this count. The jury found 10 to two that both Ford and Drew failed to warn the Wilsons of the Explorer's crashworthiness defect.

The jury awarded Mrs. Wilson $573,348 for past economic loss, $4,032,656 for future economic loss, $6 million for past noneconomic loss and $99 million for future noneconomic loss.

The jury found nine to three that Ford acted with oppression, fraud or malice. The court's poll of the jury confirmed each juror had found fraud, malice or oppression by clear and convincing evidence.

In a separate phase of trial, the parties presented evidence and arguments on punitive damages. During closing argument, counsel for Ford said: "It's impossible not to be angry at Ford, Ford Motor Company, for what decisions that in marketing and selling this Ford Explorer it knowingly put a defective product out on the market [*sic*] and caused the family tragedy that you see before you now. . . . [¶] . . . [¶] . . . We are sorry. I don't think—I know it rings hollow, but I am going to say it anyway. We are

sorry. We are sorry that we let you down. The engineers are sorry that they let the rest of the company down."

The jury awarded $246 million in punitive damages.

F. Posttrial Motions and Judgment

Ford filed motions for new trial and judgment notwithstanding the verdict (JNOV).

The JNOV motion attacked the evidence supporting the punitive damages award. The court reexamined the evidence and concluded that the Wilsons had met their burden of producing clear and convincing evidence that Ford acted with malice, a conscious disregard for safety, and engaged in despicable conduct.

Ford's motion for new trial challenged the size of the compensatory and punitive damages award. The court found "the damages awarded are excessive," but also stated, "The Court does not find that the jury rendered its verdict due to passion or prejudice." The court conditionally granted a new trial unless the Wilsons consented to a reduction of Mrs. Wilson's compensatory damages award to $70 million, Mr. Wilson's loss of consortium award to $5 million and the punitive damages award to $75 million. Subtracting the jury's award of economic damages in the amount of $4,606,004, the court's remittitur left Mrs. Wilson with an award of noneconomic damages in the amount of $65,393,996.

In assessing the propriety of the amount of compensatory damages awarded to Mrs. Wilson, the court stated: "The evidence, in the Court's opinion, is insufficient to support a compensatory damage verdict in favor of [Mrs. Wilson] in the amount of

$109,606,004. In reaching that finding and the other findings on the verdict on damages, the Court has weighed the evidence, including reasonable inferences therefrom, and is convinced from the entire record the jury clearly should have reached a different verdict on damages. That same evidence, however, . . . is sufficient to support a compensatory damage award in favor of [Mrs. Wilson] in the amount of [$70 million]."

In assessing the proper amount of punitive damages to be awarded the court stated: "In considering these factors, the evidence showed Ford had a pattern of deficient design regarding safety in favor of increased financial returns and was a result of the conscious disregard of Ford executives. That evidence was primarily adduced through Ford's own internal memoranda and correspondence. This conduct was reprehensible and weighs in favor of punitive damages. The remittitur reduces the punitive damage award to a one-to-one ratio relative to the compensatory award. This is well within the second guidepost set forth by the Supreme Court. Even as reduced, the compensatory damage award is large. When compensatory awards are substantial, a ratio of [punitive damages] equal to the compensatory damages is within the limits of the due process guarantee. [Citation.] The punitive damages are fair and reasonable and proportionate to the amount of harm suffered by the [Wilsons]."

The Wilsons accepted the remittitur and an amended judgment was entered on September 3, 2004. Ford's timely appeals followed.

ARGUMENT

I. EVIDENTIARY ISSUES

A. Bronco II Evidence

Ford asserts it is entitled to a new trial because the trial court erroneously admitted evidence regarding the Bronco II vehicle. This contention is unavailing.

1. Background

Ford contends the court erred in denying its motion in limine that sought to exclude as irrelevant "all evidence relating to the Bronco II and Ford's decision to cease manufacture of the Bronco II." In response, the Wilsons submitted evidence that the Explorer's relevant design characteristics were derived from the Bronco II and that Ford had knowledge of the rollover risk posed by that design.

The trial court denied Ford's motion, finding the Explorer's development was "intimately tied" to the Bronco II's development, as shown by Ford's internal documents.

Ford's motion for new trial asserted the court erred by allowing evidence of the Bronco II. The court rejected this argument, finding that the Wilsons "presented substantial evidence of the design carry-over from the Bronco II to the Explorer, evidence of the intermingling of the development and testing of the Bronco II and the Explorer and the similar source of rollover problems between the Bronco II and Explorer for the Court to find the two vehicles are substantially similar."

2. Analysis

"'Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence.' " (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900 [122 Cal. Rptr. 2d 802].) " ' "The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." ' " (*Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815 [42 Cal. Rptr. 2d 459].)

The court did not abuse its discretion in admitting evidence of similar design flaws in the Bronco II to those alleged to be at fault in the Explorer. The Wilsons' expert, Dr. Renfroe, testified that the Explorer and the Bronco II shared the specific dangerous design characteristics that created instability. In fact, it would have been impossible not to have evidence on the similarities of the Explorer and Bronco II's stability characteristics as Ford itself assessed the stability of the Explorer by comparison to the Bronco II.

Ford asserts that it was error to introduce evidence of the Bronco II because they were different vehicles, citing many differences in design. However, the evidence went to similarities in a particular design flaw, not the vehicles as a whole.

Where a plaintiff intends to adduce evidence of the functioning of related products to prove that the product in question was defective, identical conditions need not be present between the two systems. Substantial similarity is sufficient. (See *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 403-404 [185 Cal. Rptr. 654, 650 P.2d 1171] (*Hasson*),

disapproved on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574 [34 Cal. Rptr. 2d 607, 882 P.2d 298].) Thus, in an action against an automobile manufacturer to recover for damages arising out of an automobile accident caused by brake failure in a 1966 model vehicle, the California Supreme Court held that the trial court had reasonable basis for admitting evidence of numerous failures occurring in 1965 models for the purpose of showing that 1966 models were similarly defective even if plaintiffs did not prove that the 1965 system was exactly the same as the 1966 system. (*Hasson*, *supra*, 32 Cal.3d at pp. 403-404.)

Ford argues that the Explorer's and Bronco II's stability characteristics were not sufficiently similar to allow the evidence concerning the Bronco II. The trial judge in the first instance must determine if the design characteristics are sufficiently similar. (*Hasson*, *supra*, 32 Cal.3d at p. 404.) As discussed, *ante*, the court found that the Bronco II's and Explorer's relevant design characteristics were substantially similar, and we must give substantial deference to that finding. (See *Bado-Santana v. Ford Motor Co.* (D.P.R. 2005) 364 F. Supp. 2d 79, 92-94 [in rollover case involving Ford Explorer, court denied Ford's motion in limine to exclude evidence of design and development history of Bronco II as too dissimilar to Explorer, finding such evidence relevant to Ford's knowledge of and failure to correct stability design flaws].)

Moreover, "[w]hen evidence is offered to show only that defendant had notice of a dangerous condition, the requirement of similarity of circumstances is relaxed: ' "[A]ll that is required . . . is that the previous injury should be such as to

attract the defendant's attention to the dangerous situation." ' " (*Hasson*, *supra*, 32 Cal.3d at p. 404.)

Here, the evidence was relevant to prove that Ford knew it was designing and manufacturing a vehicle with the same stability design defects as the Bronco II. It was also evidence that could establish malice, fraud and oppression necessary for punitive damages. Ford knew that to increase a vehicle's stability, it needed to widen the vehicle's track width and lower the center of gravity. The Wilsons presented evidence that Ford engineers requested such changes in the Explorer's design, but those were rejected. The Explorer's center of gravity, track width and SI were substantially similar to the Bronco II.

The court did not abuse its discretion in admitting evidence concerning the Bronco II's stability problems, as the Explorer's stability characteristics were substantially similar. The evidence was relevant both to prove the cause of the Explorer's stability defect and to show notice on Ford's part at the time it was designing the Explorer.

B. Exclusion of Ford's Comparative Rollover Statistics

Ford asserts that the court erred by excluding Ford's "real-world safety record and comparative data" relating to Explorer rollover rates. We reject this contention.

1. Background

Ford cites several evidentiary rulings regarding the Explorer's comparative rollover rates that it asserts were erroneous. First, the court ordered stricken from the trial court record testimony offered by Ford that the Explorer "had one of the best

rollover rates compared to other SUV's in its class." The court also refused to allow Ford's automotive engineering expert Don Tandy to testify as to whether the Explorer had a higher rollover rate than other SUV's (sport utility vehicles). Ford asserts that the court erred in refusing to allow its statistical expert, William Wecker, Ph.D., to testify that the Explorer had a rollover rate comparable to other SUV's. The court also refused to allow Ford's stability expert Lee Carr to testify concerning accident statistics and rollover rates of other vehicles.

Ford also contends that the court "compounded its errors" by allowing several of the Wilsons' witnesses to testify concerning their involvement in other Explorer rollover cases.

2. Waiver

The Wilsons assert that Ford waived the right to assert error regarding the testimony of its expert Dr. Wecker concerning the Explorer's rollover rate compared to other vehicles. The Wilsons point out that they brought a motion in limine to exclude his opinion, but the court reserved ruling on his testimony pending a foundational showing by Ford, and thereafter Ford did not attempt to lay a foundation for his testimony.

Ford responds that the court ruled Dr. Wecker's testimony inadmissible in an unreported sidebar conference and that counsel for the Wilsons acknowledged this ruling on the record when it argued against admission of other similar evidence that Ford could not "get in from the Wecker types." Ford also asserts that it objected on several occasions more generally that it should have been allowed to

present evidence of the Explorer's safety record as compared to other vehicles.

We conclude that there was no waiver. First, a review of the trial transcript indicates that counsel for the Wilsons did acknowledge on the record that Dr. Wecker's testimony was previously excluded by the court. Moreover, " '[w]here an entire class of evidence has been declared inadmissible or the trial court has clearly intimated it will receive no evidence of a particular class or upon a particular issue, an offer of proof is not a prerequisite to raising the question on appeal . . . .' [Citation.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2005) P 8:275.6, p. 8-154.)

3. Analysis

Ford asserts that expert testimony concerning the Explorer's comparative rollover rate was admissible to demonstrate that the Explorer "is a reasonably safe vehicle that is not unusually prone to roll over in comparison to other vehicles." However, such evidence was irrelevant and inadmissible.

A manufacturer cannot defend a product liability action with evidence it met its industry's customs or standards on safety. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal. App. 3d 757, 803 [174 Cal. Rptr. 348] (*Grimshaw*); *Foglio v. Western Auto Supply* (1976) 56 Cal. App. 3d 470, 477 [128 Cal. Rptr. 545].) In fact, admission of such evidence is reversible error. (*Heap v. General Motors Corp.* (1977) 66 Cal. App. 3d 824, 831 [136 Cal. Rptr. 304].) This is because in strict liability actions, "the issue is not whether defendant exercised reasonable care." (*Foglio*, *supra*, 56 Cal. App. 3d at p. 477.) Rather, the issue is whether the product fails to perform as the ordinary consumer would expect. (*Barker v. Lull Engineering Co.* (1978)

20 Cal.3d 413, 435 [143 Cal. Rptr. 225, 573 P.2d 443] (*Barker*).)

In *Grimshaw*, *supra*, 119 Cal. App. 3d 757, the defect at issue was the Ford Pinto's gas tank. Ford requested that the court instruct the jury that, in considering whether the gas tank was defective, it was to consider " 'the extent to which its (Pinto's) design and manufacture matched the average quality of other automobiles and the extent to which its design and manufacture deviated from the norm for automobiles designed and manufactured at the same point in time.' " (*Id.* at p. 803.) The Court of Appeal held that the trial court properly refused the instruction as improper evidence of industry custom or practice. (*Ibid.*)

Thus, the court properly excluded evidence whereby Ford sought to prove that the Explorer's rollover rate was comparable to other vehicles on the road. That was evidence that improperly sought to show that it met industry standards or custom for rollovers.

Ford asserts that the comparative rollover rate was relevant to the "risk/benefit" analysis that must be considered in determining if a product is defective, citing *Barker*, *supra*, 20 Cal.3d 413. However, as explained in *Grimshaw*, the *Barker* risk/benefit analysis does not allow admission of such evidence: "The *Barker* court's enumeration of factors which may be considered under the risk-benefit test not only fails to mention custom or usage in the industry, the court otherwise makes clear by implication that they are inappropriate considerations." (*Grimshaw*, *supra*, 119 Cal. App. 3d at p. 803.)

Ford also contends that the comparative rollover evidence was relevant to prove it did not act with

oppression, fraud or malice and therefore was admissible to rebut the Wilsons' claim for punitive damages. However, as will be discussed in more detail, post, the Court of Appeal in *Grimshaw*, *supra*, 119 Cal. App. 3d 757 held that compliance with industry standards or custom was irrelevant not only to the issue of defect, but also to punitive damages. (*Id.* at pp. 792, 803, 807-822.) Indeed, counsel for Ford acknowledged at trial that the Wilsons' punitive damages allegations did not change *Grimshaw's* prohibition on industry custom and practice evidence.

Even if the comparative rollover data were not inadmissible as a matter of law as improper industry and custom evidence, it would still be inadmissible as unreliable and misleading. Ford's statistics from which the comparable rollover rate testimony would flow were drawn from two databases, FARS (Fatality Analysis Reporting System), and a state database tracking state accident information. FARS only included fatal rollover accidents and did not compare the relative stability of vehicles; included all vehicle types, not just SUV's; and did not track the cause of rollovers or the resulting injuries. The state database encompassed accidents from only 10 states, did not include the two most populous states, California and Texas, and did not detail causes of the rollovers.

In Ford's offer of proof for its expert Carr, it admitted his testimony was going to compare the Explorer's rollover performance to a variety of dissimilar vehicles, including Greyhound buses and passenger cars. The court excluded only that portion of his testimony. Carr opined that the Explorer's design did not contribute to the rollover. Rather, according to Carr, the Explorer rolled because

Mrs. Wilson steered it onto the dirt shoulder, which, because of the loose soil and uneven terrain, would make any vehicle, not just the Explorer, susceptible to rolling over. Carr also testified that the Explorer complied with stability guidelines related to steering. Over the Wilsons' objection, Carr was allowed to show a video of the rollover response of a 1992 Chevrolet van to challenge the testing methodology used by the Wilsons' expert Dr. Renfroe. Over the Wilsons' objection he was also allowed to testify concerning the number of rollovers of various vehicles around the country. According to Carr, the vast majority of rollovers for all types of vehicles happened off the paved surface of the road.

Further, while the court excluded evidence of the Explorer's comparative safety, accident or injury rates, it did not exclude the Explorer's own "real world safety record." Indeed, Ford never proffered such evidence at trial.

The court did not abuse its discretion by excluding Ford's proffered evidence on comparative rollover rates.

The court also did not "compound its errors" by allowing several of the Wilsons' witnesses to testify as to their involvement in other Explorer rollover cases. Ford did not object to this testimony as improper. The only objection to this testimony overruled by the court was "asked and answered."

II. NONECONOMIC DAMAGES

Ford asserts that the noneconomic damages award, as remitted by the court, of approximately $65 million to Mrs. Wilson, and the $5 million award to Mr. Wilson, as remitted by the court, are excessive as a matter of law, are the result of passion and

prejudice, are extreme when viewed against awards that have been upheld in comparable cases, and violate its due process rights. Amicus curiae AAM also asserts that the award violates due process principles. We conclude that the noneconomic damage award to Mrs. Wilson is excessive, the result of passion or prejudice, and that the substantial evidence in this case supports an award of $18 million. We also conclude, however, that Mrs. Wilson's award did not violate due process principles. We conclude that the award to Mr. Wilson of $5 million in damages for loss of consortium is reasonable and we affirm that award.

A. Size of the Award

1. Standard of review

"The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. . . . The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-507 [15 Cal. Rptr. 161, 364 P.2d 337] (*Seffert*).)

"The reviewing court does not act de novo, however. As we have observed, the trial court's determination of whether damages were excessive 'is entitled to great weight' because it is bound by the 'more demanding test of weighing conflicting

evidence than our standard of review under the substantial evidence rule . . . .' [Citation.] All presumptions favor the trial court's determination [citation], and we review the record in the light most favorable to the judgment [citation]." (*Fortman v. Hemco, Inc.* (1989) 211 Cal. App. 3d 241, 259 [259 Cal. Rptr. 311].)

Further, " 'where the trial court has required a remission as a condition to denying a new trial "a verdict is reviewed on appeal as if it had been returned in the first instance by the jury in the reduced amount." [Citations.]' [Citation.]" (*West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal. App. 3d 831, 877 [220 Cal. Rptr. 437] (*West*).)

2. Analysis

In reviewing a noneconomic damage award "[t]here are no fixed or absolute standards by which an appellate court can measure in monetary terms the extent of the damages suffered by a plaintiff as a result of the wrongful act of the defendant. The duty of an appellate court is to uphold the jury and trial judge whenever possible. [Citation.] The amount to be awarded is 'a matter on which there legitimately may be a wide difference of opinion'[citation]. In considering the contention that the damages are excessive the appellate court must determine every conflict in the evidence in respondent's favor, and must give him the benefit of every inference reasonably to be drawn from the record [citation]. [¶] While the appellate court should consider the amounts awarded in prior cases for similar injuries, obviously, each case must be decided on its own facts and circumstances. Such examination demonstrates that such awards vary greatly. [Citations.] Injuries are seldom identical and the amount of pain and

suffering involved in similar physical injuries varies widely. These factors must be considered." (*Seffert, supra*, 56 Cal.2d at p. 508.)

Further, "[t]he fact that an award may set a precedent by its size does not in and of itself render it suspect. The determination of the jury can only be assessed by examination of the particular circumstances involved." (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal. App. 3d 626, 654-655 [151 Cal. Rptr. 399].)

"An appellate court should not assume to substitute its appraisal, for that of a jury, of the amount of damages for physical pain and mental suffering sustained by a party in a case where trial by jury was had as a matter of right [citation], but in a case where it appears that a verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment [citations] the appellate court may reverse the judgment and remand the case for a new trial either on all the issues or on the issue of damages alone [citations], or it may, in the interests of justice and with the consent of the party against whom the modification is made, modify the judgment as to the amount of damages, and affirm it as modified [citations]." (*Deevy v. Tassi* (1942) 21 Cal.2d 109, 120-121 [130 P.2d 389]; see also *Hunton v. California Portland etc. Co.* (1944) 64 Cal. App. 2d 876, 882-885 [149 P.2d 471] [trial court, on a motion for new trial, found compensatory damages award excessive and reduced a jury verdict of $40,000 to $18,000; on appeal the appellate court, finding the

award still excessive, reduced the damages to $10,000].)

Ford characterizes the jury's award to the Wilsons of $118 million in noneconomic damages ($105 million to Mrs. Wilson + $13 million to Mr. Wilson) and the court-reduced award of approximately $70 million (approximately $65 million to Mrs. Wilson + $5 million to Mr. Wilson) as "irrational, punitive, and the clear product of passion and prejudice" and asserts that the evidence "does not come close to supporting this unprecedented award."[6] We conclude that although Mrs. Wilson's injuries were catastrophic, analyzing all appropriate factors, reviewing the trial court record, and using our collective experience, we must reduce the noneconomic damage award as excessive and the product of passion and prejudice. We also conclude that the loss of consortium award to Mr. Wilson is reasonable and affirm that award. Because Ford focuses its discussion almost exclusively on the award to Mrs. Wilson, our analysis likewise focuses on whether that award was excessive.[7]

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[6] In making this assertion, Ford neglects to discuss the evidence in support of the Wilsons' damages at all, much less in the light most favorable to the judgment. This failure in itself would allow this court to disregard Ford's arguments concerning damages. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [19 Cal. Rptr. 3d 416].) Nevertheless, we elect to consider Ford's contention on the merits.

[7] We also note, as discussed, *ante*, that we do not review whether the jury's original award of $118 million to the

[Footnote continued on next page]

a. Nature of Mrs. Wilson's injuries

A review of the evidence shows the substantial nature of the Wilsons' noneconomic injuries. Mrs. Wilson, a once vibrant and energetic wife and mother is now a paraplegic, who is in constant and debilitating pain, has lost all control over her bladder and bowel movements, and now requires constant care from her husband. She is disfigured and subject to ailments associated with her injuries that could worsen her injuries or shorten her life span. Mr. Wilson has lost his role as a husband and is now reduced to being a constant caregiver.

Noneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person's bodily integrity (*i.e.*, the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy. (Judicial Council of Cal. Civ. Jury Instns. (2003-2004), CACI No. 3905A.)

In this case, the noneconomic damages suffered by Mrs. Wilson were substantial, permanent, and support a significant award. However, the reduced award of approximately $65 million is, even given the severity of her injuries, disproportionate to those

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[Footnote continued from previous page]

Wilsons "shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert, supra*, 56 Cal.2d at pp. 506-507.) Rather, since the court remitted the award to $70 million as a condition of denying Ford's motion for new trial, we review the noneconomic damage award " ' "as if it had been returned in the first instance by the jury in the reduced amount." [Citations.]' [Citation.]" (*West, supra*, 174 Cal. App. 3d at p. 877.)

injuries so as to "raise a strong presumption that it is based on prejudice or passion." (*Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, 807 [7 Cal. Rptr. 2d 82].)

b. Amount of award vs. projected life span

We also consider the amount of the damage award in connection with Mrs. Wilson's projected life span of 35 years.[8] The damage award, as reduced by the court, still amounts to approximately $1,868,399 per year over her projected life span, an extremely high amount. Ford on the other hand argues an award of $1 million is reasonable, which would work out to $28,571 per year, and only $78 per day. While we believe that the award as reduced by the trial court is still excessive, we also do not believe that Ford's suggested award fairly and justly compensates Mrs. Wilson.

c. Comparison with other awards

In support of its position that the noneconomic damage award is excessive as a matter of law, Ford attempts to compare the award to published California decisions that have upheld damage awards on similar facts. The Wilsons, on the other hand, argue that it is not appropriate to compare the award here to other cases, that we must review it only by looking at the particular facts of this case. We conclude that while it is appropriate to look at awards in similar cases, ultimately we must

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[8] Mrs. Wilson's projected life span at the time of trial was 33 years. However, we use 35 years here because the award of noneconomic damages included an award for approximately two years of past general damages.

determine the propriety of the award based upon the facts of this case.

In *Seffert*, *supra*, 56 Cal.2d at page 508, the California Supreme Court stated, "While the appellate court *should consider the amounts awarded in prior cases for similar injuries*, obviously, each case must be decided on its own facts and circumstances. Such examination demonstrates that such awards vary greatly. [Citations.] Injuries are seldom identical and the amount of pain and suffering involved in similar physical injuries varies widely." (Italics added.) More recently, the California Supreme Court made the following statements in a footnote: "Defendants have compiled a lengthy list of judgments awarding damages which have been reversed on appeal as excessive. Those cases do not, *in and of themselves*, mandate a reversal here. The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding. [Citations.] Thus, we adhere to the previously announced and historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice on the part of the jurors." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65, fn. 12 [118 Cal. Rptr. 184, 529 P.2d 608] (Bertero), italics added.)

The Wilsons assert that Bertero stands for the proposition that Courts of Appeal should not compare the damages in other similar cases at all in reviewing a claim that an award is excessive. However, we do not read Bertero so broadly. Its criticism of comparing damage awards from other cases was limited to the statement that judgments awarding damages in other cases "do not, *in and of themselves*, mandate a reversal." (*Bertero*, *supra*, 13 Cal.3d at p. 65, fn. 12, italics added.) In the quoted footnote the *Bertero* court cited the earlier Seffert court as support for its conclusion. (*Bertero*, *supra*, at p. 65, fn. 12.) Therefore, we conclude that a verdict may not be held to be excessive as a matter of law simply because it exceeds the amount awarded in other cases. Courts of Appeal must make their decisions based on the evidence in the case being reviewed. However, evidence of other verdicts is still relevant as a point of reference, to provide context to the award by establishing a range of values for similar injuries.

Ford cites five reported California decisions where noneconomic damages for purportedly similar injuries ranged from $1 million to $8.4 million. (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287 [96 Cal. Rptr. 2d 605] [50-year-old plaintiff—award of $1 million]; *Niles v. City of San Rafael* (1974) 42 Cal. App. 3d 230 [116 Cal. Rptr. 733] [child suffered paralysis from head trauma—award of $1,604,371]; *Rosh v. Cave Imaging Systems, Inc.* (1994) *26 Cal.App.4th 1225* [32 Cal. Rptr. 2d 136] [the plaintiff rendered paraplegic from gunshot—award of $2.99 million]; *Fortman v. Hemco, Inc.* (1989) 211 Cal. App. 3d 241 [259 Cal. Rptr. 311] [three-year-old girl rendered paraplegic from fall from car—$6 million award]; *Hess v. Ford Motor Co.*

(2002) 27 Cal.4th 516 [117 Cal. Rptr. 2d 220, 41 P.3d 46] [the plaintiff rendered paraplegic after his truck rolled—$8.4 million award].)

However, the cited cases are of only small assistance. Of the five California cases cited by Ford, in only two were the damages claimed to be excessive, and in both cases the damages awards were upheld. (*Niles v. City of San Rafael*, *supra*, 42 Cal.App.3d at p. 244; *Fortman v. Hemco, Inc.*, *supra*, 211 Cal. App. 3d at p. 261.) In the case with the largest noneconomic damage award, the size of the award was not challenged on appeal. (*Hess v. Ford Motor Co.*, *supra*, 27 Cal.4th at p. 520.) Ford cites no published California decisions involving same or similar injuries where a noneconomic damage award was reversed as excessive.

The Wilsons on the other hand cite an unpublished California decision that involved an award of $38 million in combined economic and noneconomic damages, reduced by 50 percent due to the plaintiff's comparative fault, to a quadriplegic who was 53 years old, and an award to his wife of $13 million for loss of consortium, which the Court of Appeal upheld. The Wilsons also cite a published decision by an appellate court in Indiana that upheld an award of $55 million in combined economic, noneconomic, and loss of consortium damages, already reduced by a finding that the plaintiff was 20 percent at fault, making the total award $66 million. (*Ritter v. Stanton* (Ind.Ct.App. 2001) 745 N.E.2d 828, 833, 857.)

A review of all of these cases shows a range between $1 million and $66 million in compensatory damages awards and substantial differences in the facts of each case. Thi demonstrates that while a

comparison of other cases may give us a point of reference, ultimately our decision must be based upon the evidence in this case.

d. Evidence in record that jury acted out of passion or prejudice

Perhaps the most important factor that we must consider in determining if the award of noneconomic damages is excessive, other than the amount of the award, is whether there is evidence in the record to support defendants' claim that the jury acted out of passion or prejudice. In this case we have substantial evidence in the record that demonstrates the jury's award was the product of such improper emotions and therefore must be reduced.

In discussing economic damages in closing argument, counsel for the Wilsons argued that Mrs. Wilson suffered "an economic loss of $4.6 million dollars . . ., based on the evidence that came before you." The jury awarded Mrs. Wilson what counsel asked for. The reasonableness of this amount for economic damages is not in dispute on appeal.

In discussing noneconomic damages in his closing argument, counsel for the Wilsons described some of the matters that could be included in such an award. This included past and future physical pain, mental suffering, and loss of enjoyment of life. Counsel then suggested a method for calculating these numbers, taking into account the past injury, as well as future injuries over her 33-year life expectancy. Following that discussion, counsel made the following statement: "I respectfully submit that if you look at the catastrophic injury that we have, the numbers there, they are probably three to four times the specials is what you are going to find. It's going to be

fair, just and reasonable. And this is an awful lot of money. I know it is. It's a lot of money. But when someone says it's a lot of money, why are we doing this, you tell them it's a lot of pain. It's a loss of a human being's dignity and worth. . . . And I submit to you that there is no higher value than a good woman who is a good wife, a good mother, a good neighbor, that is out there helping others. And I can't put the number on it, but I want you to be reasonable, just and fair, recognizing the humanity of this issue." (Italics added.) Thus, counsel was requesting the jury award noneconomic damages to Mrs. Wilson in an amount three to four times the amount they awarded in economic damages, or $13.8 to $18.4 million.

As to Mr. Wilson's loss of consortium claim, counsel argued that "it's probably going to be equated perhaps reasonably just to what the economic loss is for his nonecconomic loss." Counsel was thus requesting that the jury award Mr. Wilson $4.6 million for his loss of consortium claim.

Next, addressing all the compensatory damages, the Wilsons' counsel stated the following: "I invite defense counsel to address my discussion of damages. If he does not discuss damages in his closing, if he does not disagree with me, you can accept these numbers as reasonable and just and fair." (Italics added.)

Defense counsel did not address the issue of damages in closing argument.

When we compare these numbers to the amount the jury awarded, it is apparent that the jury disregarded the Wilsons' counsel's own statements as to what was a reasonable amount to award in this case. On noneconomic damages to Mrs. Wilson, the

jury awarded $105 million, or approximately 13 times the amount counsel requested and stated was "fair, just and reasonable." The reduced award of approximately $65 million is still approximately three to five times that amount. This provides compelling evidence that the jury rejected what even the Wilsons' counsel believed was fair and reasonable, and acted out of passion or prejudice.

The jury's award of loss of consortium damages also supports this conclusion. The jury awarded Mr. Wilson $13 million for his loss of consortium claim, or almost three times what the Wilsons' counsel requested.

The jury's complete rejection of the damages suggested by the Wilsons' counsel, a range for noneconomic damages and an amount for loss of consortium that counsel characterized as fair, reasonable and just, is compelling evidence the jury acted out of passion or prejudice. The fact that the jury's award, and the award as remitted by the court, far exceeded, and had no relation to, the amounts requested by counsel suggests that the jury was not acting as a fair and neutral trier of fact.

There was also a question posed by Ford's counsel that, in light of Mrs. Wilson's catastrophic injuries, may well have inflamed the passions of the jury significantly enough to result in the excessive damage award. Ford's trial counsel, in its last question on cross-examination of Mr. Wilson, posited the following:

"[Q] The silver lining, to the extent that there could be one, it has brought you and [Mrs. Wilson] and the family closer together? [¶] . . .

"[A] I think where we were together before, we are together after. I don't think it's done more for us. I think it's—I don't think it's a benefit or a plus in any way. I am sorry, I don't think I can see it that way."

This question implied that the family should find a silver lining in what befell Mrs. Wilson. It may very well have been viewed as callous by the jury and might explain, in some manner, the actions of the jury in rendering a verdict so out of line with the amounts requested by the Wilsons' own counsel.

e. Our review of the record

In addition to considering the above factors, we have reviewed the record to determine whether the award, as remitted by the court, is excessive. This includes reviewing the nature and extent of Mrs. Wilson's injuries, the testimony of lay and expert witnesses on damages, and the damage award. Our own review of the record reveals that the noneconomic damage award was excessive and was the product of passion or prejudice.

f. Conclusion

Based upon all of the above factors, and utilizing our collective experience, we conclude that the award of noneconomic damages to Mrs. Wilson, even as remitted by the court, was excessive and that the facts of this case instead support an award of $18 million, within the ratio/range requested by the Wilsons' counsel. As we have discussed, *ante*, the award, even as reduced by the trial court, far exceeds the amount suggested as reasonable, fair and just by the Wilsons' attorney to the jury. That is compelling evidence that the jury acted out of "passion and prejudice" in awarding noneconomic damages.

Further, although each case must be analyzed on its own facts, the award far exceeds any award we could locate that was upheld by a California appellate court.

However, the reduction to $18 million in noneconomic damages is in the range of one recent unreported decision in California where the award of such damages was upheld on appeal. Moreover, utilizing our collective experience, we conclude that an award of $18 million in noneconomic damages is proportionate to Mrs. Wilson's substantial injuries, and is proportionate to the economic damages award. Considering the substantial nature of Mrs. Wilson's injuries, we conclude that $18 million is a just and reasonable amount, an amount " 'a reasonable person would estimate as fair compensation' " *under the circumstances of this case. (Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1665 [28 Cal. Rptr. 2d 88].)

Ford asserts briefly that the remitted award of $5 million for loss of consortium to Mr. Wilson was also excessive, citing cases with loss of consortium awards of $229,000 to $2.55 million. However, utilizing the same factors we considered above, and noting the devastating impact on Mr. Wilson's life that Ford's conduct has caused, we do not find the remitted award for loss of consortium to be excessive or the product of passion or prejudice. The amount to which the court reduced these damages approximates the amount suggested by the Wilsons' counsel.

Moreover, to avoid further delay and expense to the parties, and because the record in this matter is sufficiently definite to determine the proper amount of noneconomic damages, we will remit the award of

noneconomic damages to $18 million for Mrs. Wilson, conditioned on her acceptance of this reduced amount. If Mrs. Wilson does not agree to the reduced amount, the matter will be reversed and remanded for a new trial on the issue of noneconomic damages, as specified in California Rules of Court, rule 24(d).[9]

B. Due Process Considerations

Ford also asserts that the noneconomic damages award is "unconstitutionally excessive as a matter of federal due process." Amicus curiae AAM makes the same argument, asserting that due process considerations applicable to punitive damages awards should also apply to compensatory damages. This contention is unavailing.

Ford and AAM ignore the fact that while the United States Supreme Court has in several recent decisions held that due process rights limit the amount of punitive damages that may be imposed upon an individual, a basic underpinning of those decisions was the very distinction between compensatory damages, which are designed to

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[9] Ford asserts that if the noneconomic damages award to Mrs. Wilson is determined to be the product of passion or prejudice, we are required, as a matter of law, to grant a new trial on all issues. However, case authority demonstrates it is appropriate to issue a remittitur under such circumstances. (*See Deevy v. Tassi, supra,* 21 Cal.2d at pp. 120-121; *Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 586-589 [81 P.2d 894]; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1255-1256 [1 Cal.Rptr.2d 301]; *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1011-1012 [193 Cal.Rptr. 206].)

compensate the plaintiff, and punitive damages, which are in the nature of fines or sanctions, designed to punish and deter a defendant. For example, in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416 [155 L. Ed. 2d 585, 123 S. Ct. 1513] (*State Farm*), the majority opinion began its analysis by making just this distinction: "[I]n our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. [Citation.] Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.' [Citations.] By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution." After establishing this important distinction, the high court concluded that the "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." (*State Farm*, *supra*, 538 U.S. at p. 416, italics added.) The court likened punitive damages to criminal penalties, imposed without the protections of a criminal trial: "Although these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." (*Id.* at p. 417.)

Ford and AAM cite no authority that constitutional due process limitations applicable to punitive damages awards, as recently confirmed by the United States Supreme Court (see *State Farm*, *supra*, 538 U.S. at p. 412), also apply to compensatory damages awards. Nevertheless, AAM asserts that the rule applicable to punitive damages awards should be extended to noneconomic damage

awards because (1) defendants need notice of their potential exposure to such liability that is imposed in a vague and standardless manner; and (2) the lack of concrete standards for such awards enables juries to pursue punitive goals in rendering such awards.

However, because noneconomic damages are not a punishment that serves to deter conduct, but rather compensation to make a plaintiff whole as a result of a defendant's conduct, uncertainty in the proof does not preclude their recovery: "[O]nce the cause and existence of damages have been . . . established [with reasonable certainty], recovery will not be denied because the damages are difficult of ascertainment. . . . The law only requires that the best evidence be adduced of which the nature of the case is capable, and the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision." (*Dallman Co. v. Southern Heater Co.* (1968) 262 Cal. App. 2d 582, 594 [68 Cal. Rptr. 873]; see also *Speegle v. Bd. of Fire Underwriters* (1946) 29 Cal.2d 34, 46 [172 P.2d 867] [" 'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty [in fixing the amount of damages] which his wrong has created' "].)

As the United States Supreme Court has noted, " '[T]he common law rule as it existed at the time of the adoption of the Constitution' was that 'in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it.' [Citation.]" (*Feltner v. Columbia Pictures Television, Inc.* (1998) 523 U.S. 340, 353 [140 L. Ed. 2d 438, 118 S. Ct. 1279]; see also *Barry v. Edmunds*

(1886) 116 U.S. 550, 565 [29 L. Ed. 729, 6 S. Ct. 501] ["nothing is better settled than [the principle] that, in . . . actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict"].) Thus, we are loath to usurp this core function of the jury by relying on mathematical formulas to assess the amount of damages that may be awarded, simply because noneconomic damages are not readily quantifiable.

Nor does the imagined danger that vague standards for imposing or reviewing noneconomic damage awards will lead to juries using such awards as punishment as opposed to compensation justify imposing due process limitations on such awards. The jury was instructed that they "must not let bias, sympathy, prejudice, or public opinion influence [their] decision." Although the jury was instructed that as to noneconomic damages "[n]o fixed standard exists for deciding the amount of these damages," they were also instructed that they "must use [their] judgment to decide a reasonable amount based on the evidence and [their] common sense." The jury was instructed that for future economic damages, "[Mrs.] Wilson must prove that she is reasonably certain to suffer that harm." The court, in instructing the jury on noneconomic damages, also delineated the type of harm for which Mrs. Wilson could recover: "Noneconomic damages may consist of the following: [¶] Past and future physical pain, past and future mental suffering, past and future enjoyment of life, past and future disfigurement, past and future physical impairment, past and future inconvenience, past and future grief, past and future anxiety, past and future humiliation, past and future emotional distress."

Thus, under these instructions juries are given guidance as to the proper matters they may consider in making an award of noneconomic damages. These guideposts protect against the purported danger that juries might use such an award to punish a defendant.

Moreover, to the extent that a jury's award of noneconomic damages is challenged as excessive, the judge, sitting as a 13th juror, then will review the evidence to determine if the award should be remitted. The trial judge is not limited to setting aside an excessive damage award where there is evidence the jury acted out of passion or prejudice. Rather, " 'it is within the sound discretion of the trial court in ruling on a motion for a new trial on the ground of excessive damages, to grant the same when there is a substantial conflict in the evidence regarding the extent of the damage.'" (*Hughes v. Hearst Publications, Inc.* (1947) 79 Cal. App. 2d 703, 705 [180 P.2d 419].) This gives the defendants a further check against excessive awards of noneconomic damages.

Finally, the standard under which appellate courts review such awards, that awards will be reversed if they are the product of "passion or prejudice," also serves to protect against such results. It is true that recent cases have stated that awards for emotional distress can in some instances have a punitive element. (*Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 223 [40 Cal. Rptr. 3d 92]; *State Farm*, *supra*, 538 U.S. at p. 426.) However, by reducing the award to Mrs. Wilson for noneconomic damages to $18 million, an amount proportionate to her injuries and economic loss, we have removed that portion of the award that was the

product of "passion or prejudice," and no punitive element remains.

AAM relies heavily upon a law review article for its position that the vague standards for quantifying noneconomic damage awards justifies imposing federal due process constraints on such awards. However, the author of that article concluded that the solution to such unchecked awards is limits or standards imposed by legislatures, not application of due process notions to compensatory awards. (Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System* (2004) 90 Va. L.Rev. 1401, 1414, 1417-1418.)

Ford and AAM cite one out-of-state authority that states in a footnote that "[a] grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.' " (*Gilbert v. DaimlerChrysler Corp.* (2004) 470 Mich. 749 [685 N.W.2d 391, 400, fn. 22].) However, that court expressly declined to address this constitutional issue and therefore it is not authority for the proposition cited. (*Ibid.* ["there is no need to reach this constitutional question"].)

We conclude that it is not necessary to impose federal due process principles to limit noneconomic damage awards because (1) the Supreme Court in *State Farm*, *supra*, 538 U.S. 408 imposed due process limits on punitive damages awards because they are similar to criminal penalties, without the protections afforded the defendants in criminal proceedings, and noneconomic damages are designed to compensate, not punish, a defendant; (2) the defendants have adequate notice of potential awards; and (3) the review accorded damage awards by trial and

appellate courts ensures that there is no punitive element in noneconomic damage awards.

III. PUNITIVE DAMAGES

Ford asserts that the punitive damages award must be reversed because (1) the Wilsons only proved that reasonable people could disagree regarding the design decisions made by Ford; (2) it complied with all applicable governmental standards; (3) it was improper to admit evidence of Ford's overall financial condition; and (4) the award is excessive under federal and California law. *Amicus curiae* PLAC argues in support of Ford's first contention, and amicus curiae the Chamber argues in support of the second. We conclude that the punitive damages award, as remitted, is excessive and reduce it to $55 million. We reject the remainder of Ford's and *amici curiae's* contentions.

A. The "Reasonable People Can Disagree" Argument

1. Standard of Review

We review an award of punitive damages to see if there is substantial evidence that supports a finding by clear and convincing evidence that a defendant acted with fraud, malice or oppression. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 606 [92 Cal. Rptr. 2d 897].)

2. Analysis

In this case the Wilsons presented evidence, which the jury accepted, that Ford knew of dangerous instability defects in the Explorer. Ford's own testing showed that it was unstable and prone to rollover on flat dry pavement at less than highway speeds. Ford knew before the Explorer was released

for sale that the same instability characteristics led to serious injuries to Bronco II drivers. The Wilsons presented evidence that Ford knew that the Explorer's roof was weak and that roof crush caused injury during rollover accidents. Ford had the technology to make the Explorer stable and strengthen the roof, but did not use it. The modifications to strengthen the roof would have cost approximately $20 per vehicle. This evidence constitutes substantial evidence to support the jury's decision to award punitive damages.

Ford asserts, however, that because there was a "reasonable disagreement" among experts concerning the propriety of its design decisions it cannot, as a matter of law, be subject to punitive damages. We reject this contention.

The Wilsons presented expert testimony concerning the design and safety issues on the Explorer. Ford presented contrary expert testimony. The jury rejected the testimony of Ford's experts, as it was entitled to do, that its design decisions were proper and reasonable. Ford's assertion that punitive damages are not allowed unless all experts agree there were improper design decisions is unavailing. If such an assertion were true, punitive damages would never be allowed in cases where the defendant simply had an expert that disagreed with the plaintiff's expert.

Moreover, the California cases cited by Ford to support this contention do not support its position. They were cases where there was simply a failure of proof to support a punitive damages award. (See *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 996-997 [4 Cal. Rptr. 2d 837, 824 P.2d 643]; *Chateau Chamberay Homeowners Assn. v. Associated*

Internat. Ins. Co. (2001) 90 Cal.App.4th 335, 348 & 350, fn. 10 [108 Cal. Rptr. 2d 776]; *Mason v. Mercury Cas. Co.* (1976) 64 Cal. App. 3d 471, 474-475 [134 Cal. Rptr. 545]; *Stewart v. Truck Ins. Exchange* (1993) *17* Cal.App.4th 468, 483-484 [21 Cal. Rptr. 2d 338]; *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184-185 [28 Cal. Rptr. 2d 371].)

Ford also asserts that there was no evidence that any of Ford's decision makers believed the Explorer's design presented an unreasonable risk of injury, presenting the jury with only the "bare and illogical 'inference' that unnamed Ford officials 'must have' acted with malice . . . ." However, the Wilsons presented direct and substantial evidence of Ford management's recognition of the safety implications of their design decisions. As discussed in detail in the factual background, *ante*, there is substantial evidence that Ford decision makers knew how to make the Explorer less dangerous, but chose not to because of financial considerations. Ford's "reasonable people can disagree" argument is unavailing.

PLAC supports Ford's arguments regarding disagreements among experts as a defense to punitive damages, asserting that where there are contemporaneous disagreements among experts regarding design decisions, punitive damages should be barred. However, PLAC cites no California authority for such a proposition. The California case law PLAC cites involves the well-established rule in insurance bad faith cases that an insurer cannot be liable for bad faith if there is an objectively reasonable dispute about coverage. (*Chateau Chamberay Homeowners Assn. v. Associated*

Internat. Ins. Co., supra, 90 Cal.App. 4th at pp. 347-348; *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282, 1293 [97 Cal. Rptr. 2d 386].) However, these cases state a substantive standard of liability for insurance claims and do not address when it is proper to impose punitive damages. Notably, PLAC has cited no California product liability case that holds that expert disputes concerning design provide a defense to punitive damage liability or, for that matter, liability in its entirety.

In a footnote, PLAC also cites several out-of-state cases for the proposition that a contemporaneous disagreement among experts bars liability for punitive damages. However, several of the cases cited by PLAC simply do not state such a proposition. Rather, some stand for the proposition that expert disagreement is merely one factor that could be considered in assessing the propriety of punitive damages awards. (*Loitz v. Remington Arms Co, Inc.* (1990) 138 Ill. 2d 404 [563 N.E.2d 397, 406-407, 150 Ill. Dec. 510]; *Owens-Corning Fiberglas Corp. v. Garrett* (1996) 343 Md. 500 [682 A.2d 1143, 1158-1168]; *Satcher v. Honda Motor Co.* (5th Cir. 1995) 52 F.3d 1311, 1316-1317.)

PLAC does cite two cases from Iowa that held a reasonable disagreement among experts about the adequacy of design was a defense in those cases to punitive damages. (*Mercer v. Pittway Corp.* (Iowa 2000) 616 N.W.2d 602, 618; *Hillrichs v. Avco Corp.* (Iowa 1994) 514 N.W.2d 94, 100.) However, no case from any other state has cited these cases with approval, and we could not locate any other state that follows this "rule." Because these cases apply Iowa law, we are not bound by their holdings and decline to adopt such a rule in California.

PLAC also argues that punitive damages should be barred where there was a contemporaneous expert opinion that a product design that caused a plaintiff injury was necessary to avoid greater injuries of other kinds. This contention is unavailing.

First, this argument by PLAC focuses only on Ford's decisions regarding the Explorer's stability. There is no assertion that Ford allowed the roof defect to exist because changing the design would create a greater risk of other injuries. Because the roof's crashworthiness provided an independent basis for the award of punitive damages, this argument fails.

Further, PLAC cites to no evidence in the record to suggest that any member of Ford rejected changes to the Explorer's stability design because to do so would create a greater risk of injury in another manner. Rather, it only cites to statements made in Ford's brief that imply such a rationale, but Ford's statements are not supported by the cited record.

Ford and PLAC's "reasonable people can disagree" argument is unavailing.

B. Compliance with Government Standards

Ford and amicus curiae the Chamber assert that Ford is not subject to punitive damages as a matter of law because it complied with all applicable governmental regulatory standards. In particular, Ford asserts that it complied with FMVSS (Federal Motor Vehicle Safety Standard) 216, which sets the standard for how crush resistant an automobile roof must be. Ford also asserts that it complied with a National Highway Traffic Safety Administration (NHTSA) regulation requiring all SUV's to display a warning concerning the risk of rollovers. (See 49 Fed.

Reg. 20016 (May 11, 1984).) However, Ford and the Chamber's contentions are unavailing for several reasons.

The law in California is that punitive damages are permitted in product liability actions precisely because "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. [Citations.] Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles." (*Grimshaw*, *supra*, 119 Cal. App. 3d at p. 810.) Compliance with a law or safety regulation in itself does not establish that a product is not defective or that a defendant who sells or rents the product for use by the public has exercised due care. (See *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126-127 [184 Cal. Rptr. 891, 649 P.2d 224]; *Amos v. Alpha Property Management* (1999) 73 Cal.App.4th 895, 901 [87 Cal. Rptr. 2d 34].)

The Chamber asks us to reject the rule stated above in *Grimshaw*, *supra*, 119 Cal. App. 3d 757, that compliance with industry standards does not bar punitive damages, because that decision predates amendments to Civil Code section 3294 that modified the definitions of "oppression, fraud [and] malice" and required proof by clear and convincing evidence. But *Grimshaw* did not base its conclusions on the standard of proof for punitive damages claims or the precise definitions of the terms "oppression, fraud and malice." The Chamber points to nothing in the 1987 amendments, or to any legislative history for those amendments, suggesting the Legislature intended to disapprove *Grimshaw*.

The Chamber relies on the extensive federal regulation of the automobile industry through the NHTSA and the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act) (49 U.S.C. § 30101 et seq.), which, in conjunction with NHTSA-promulgated standards, has declared the minimum safety standards for automobiles. However, a review of the Safety Act and its legislative history demonstrates that the federal government did not intend to preclude punitive damages where an auto manufacturer has met minimum safety standards.

Title 49 United States Code section 30103(e) (section 30103(e)) of the Safety Act contains a savings clause that provides: "Compliance with a motor vehicle safety standard prescribed under this chapter *does not exempt a person from liability at common law*." (Italics added.)

Thus, section 30103(e) expressly provides that compliance with federal safety standards is *not* a defense to state common law products liability. Punitive damages have long been a part of the common law, originating in the 1763 English case *Huckle v. Money* (1763) 95 Eng.Rep. 768, and finding early acceptance in the United States when the United States Supreme Court upheld its constitutionality in *Day v. Woodworth* (1851) 54 U.S. 363, 370 [14 L. Ed. 181]. Thus, in enacting this savings clause, Congress was aware that part of the common law to which it referred in section 30103(e) included liability for punitive damages and could have excluded such damages from its terms.

The Chamber asserts that Congress, in enacting the savings clause in section 30103(e), only sought to preserve common law liability in general and did not intend to address punitive damages. However, a

review of the legislative history of the Safety Act further demonstrates that Congress intended through the savings clause to leave untouched all aspects of common law products liability actions, including awards of punitive damages.

The House Report for the Safety Act states that section 30103(e) "is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense *or otherwise to affect the rights of parties under common law particularly those related to warranty, contract, and tort liability*." (H.R.Rep. No. 1776-89, 2d Sess., p. 24 (1966), italics added.) The Safety Act's Senate sponsor stated on the Senate floor that "[c]ompliance with Federal standards would not necessarily shield any person from broad liability at the common law. *The common law on product liability still remains as it was*." (Remarks of Sen. Magnuson, 89 Cong. Rec. 14230 (daily ed. June 24, 1966), italics added.) Its House sponsor, while arguing in floor debate against the need for criminal penalties in the Safety Act stated, "[W]e have preserved *every single common law remedy that exists against a manufacturer* for the benefit of a motor vehicle purchaser. This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain in the buyer and they can be exercised against the manufacturer." (Remarks of Rep. Staggers, 89 Cong. Rec. 19663 (daily ed. Aug. 17, 1966), italics added.)

The fact that California does not follow this proposed rule that compliance with federal minimum safety standards bars claims for punitive damages is also demonstrated by the fact that such a rule has been proposed through legislation in California on

several occasions but has not been enacted. In 2000 the Legislature considered a bill that would have enacted the rule that Ford proposes. (Assem. Bill No. 2582 (1999-2000 Reg. Sess.) § 1.) However, the bill never made it out of committee. (Assem. Bill No. 2582, from committee without further action, 2 Assem. Final Hist. (1999-2000 Reg. Sess.) p. 1865.) A similar bill did not secure passage in 1996. (Assem. Bill No. 2880, from committee without further action, 2 Assem. Final Hist. (1995-1996 Reg. Sess.) p. 1711.) Another such bill was introduced in February 2006 in the Senate. (Sen. Bill No. 1429 (2005-2006 Reg. Sess.) § 2.) There would be no need for such legislation if compliance with government standards already provided a defense to punitive damages claims.

Ford and the Chamber's argument is also unavailing because there are no federal standards for stability of vehicles, one ground upon which Ford's liability for punitive damages is based. Ford points to a NHTSA regulation requiring all SUV's to display a warning concerning the risk of rollovers. (See 49 Fed. Reg. 20016 (May 11, 1984).) However, having a warning sticker is not the same as meeting a safety standard, and, in any event, it would not bar a state law claim alleging stability defects.

The Chamber asserts that NHTSA's failure to promulgate stability standards and to require only a warning sticker represents a "policy choice" based upon difficulties in predicting rollover risk and that compliance with the warning requirement alone should bar punitive damages. However, this exact argument was rejected by the Eleventh Circuit in *Watkins v. Ford Motor Co.* (11th Cir. 1999) 190 F.3d 1213, 1216-1218, a Bronco II rollover case. (See also

Ford Motor Co. v. Ammerman (Ind.Ct.App. 1999) 705 N.E.2d 539, 555-556.)

Ford's asserted compliance with federal safety regulations did not bar the punitive damages award.

C. Fair Notice of Exposure to Punitive Damages

Ford contends that if punitive damages can be awarded on this record, Civil Code section 3294 is unconstitutionally vague because it failed to give Ford fair notice that its conduct could subject it to punitive damages. This contention is unavailing.

Ford made just this argument 25 years ago in *Grimshaw*, *supra*, 119 Cal. App. 3d 757. The Court of Appeal rejected it, concluding that "punitive damages are recoverable in a nondeliberate or unintentional tort where the defendant's conduct constitutes a conscious disregard of the probability of injury to others." (*Id.* at p. 811.)

Additionally, Ford bases this contention on the fact that at most, reasonable people could disagree with the decisions it made. However, we have already discussed and rejected this argument, *ante*.

D. Consideration of Ford's Overall Financial Condition

Ford asserts that the punitive damages award must be reversed because the jury was allowed to consider its overall financial worth (almost $13 billion) as opposed to its worth tied to sales of products in California. We reject this contention.

Where the defendant's oppression, fraud or malice has been proven by clear and convincing evidence, California law permits the recovery of punitive damages "for the sake of example and by

way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) As our Supreme Court recently held, in *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1185 [29 Cal. Rptr. 3d 379, 113 P.3d 63] (Simon): "[T]he defendant's financial condition is an essential factor in fixing an amount that is sufficient to serve these goals without exceeding the necessary level of punishment. '[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.' [Citation.] '[P]unitive damage awards should not be a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes.' [Citation.]" (See also *State Farm*, *supra*, 538 U.S. at p. 428 [use of wealth as a factor not " 'unlawful or inappropriate' "].)

Despite this authority, however, Ford cites *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253 [11 Cal. Rptr. 3d 317] (*R.J. Reynolds*) for the proposition that in assessing punitive damages courts may only take into consideration the defendant's financial figures in the state where the wrong occurred.

In *R.J. Reynolds*, the State of California filed a complaint against the defendant tobacco company for an enforcement order of a consent decree entered into as part of a settlement agreement that prohibited targeting youth in advertising of tobacco products. The superior court found the defendant in violation of that agreement and entered summary judgment, permanently enjoining the company from continuing to violate the settlement. The court also awarded the state sanctions in the amount of

$20 million. The defendant appealed, and this court reversed the award of sanctions, finding them to be excessive. Relying on recent United States Supreme Court precedent holding that it was improper to impose punitive damages against a defendant for conduct in one state based upon the defendant's out-of-state conduct, we held that the superior court in *R.J. Reynolds* erred when it based its sanctions award on the defendant's nationwide spending on advertising, as opposed to its advertising activities in California. (*R.J. Reynolds*, *supra*, 116 Cal.App.4th at pp. 1289-1290.) This court found the sanctions award to be error because "the People's request for $20 million in sanctions was based on Reynolds's nationwide spending on print advertising and profitability without evidence of its advertising spending or profitability in California." (*Id.* at p. 1290.) As the court stated in *R.J. Reynolds*, "the award of sanctions for Reynolds's conduct in California could not properly be based on Reynolds's nationwide financial figures without violating Reynolds's due process rights." (*Id.* at p. 1289.)

Based upon the above quoted language, Ford asserts that it was error to allow evidence of its overall financial condition, as opposed to its financial worth in California. This contention is unavailing.

Here, the trial court properly instructed the jury, at Ford's request, that it could not consider Ford's out-of-state conduct in imposing punitive damages: "In determining the amount of punitive damages, if any, that is necessary to achieve the proper level of punishment and deterrence, you may consider only Ford's wrongful conduct, if any, that has had an adverse impact on the citizens of California. Accordingly, you may not award any punitive

damages for the purpose of punishing Ford for the sale of vehicles in other states for any injuries that may have occurred in other states, or for the purpose of changing Ford's conduct in other states."

Consideration of Ford's overall financial condition was not allowed to punish it for out-of-state conduct as in *R.J. Reynolds*, but for the broader concept of ensuring that the amount of punitive damages was sufficient to act as a deterrent. Use of a defendant's financial condition in such a manner is proper because " 'the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.' " (*Simon*, *supra*, 35 Cal.4th at p. 1185.) Consideration of only a defendant's finances as they relate to the state in which they are sued would allow it to make them " 'a routine cost of doing business that an industry can simply pass on to its customers through price increases, while continuing the conduct the law proscribes.' [Citation.]" (*Ibid.*)

E. Amount of Award

Last, Ford argues that the amount of the punitive damages awarded to the Wilsons is excessive under the federal Due Process Clause of the 14th Amendment to the United States Constitution. We conclude that, after reducing the noneconomic damages award to Mrs. Wilson to $18 million, the award of punitive damages is excessive and will be reduced to $55 million, an approximate two-to-one ratio to the total compensatory damages award ($4.6 million in economic damages + $18 million in noneconomic damages + $5 million in loss of consortium damages = $27.6 million x 2 = $55.2 million).

1. Standard of review

"In deciding whether an award of punitive damages is constitutionally excessive . . . we are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct. [Citations.] This '[e]xacting appellate review' is intended to ensure punitive damages are the product of the ' " 'application of law, rather than a decisionmaker's caprice.' " ' [Citation.] [¶] On the other hand, findings of historical fact made in the trial court are still entitled to the ordinary measure of appellate deference." (*Simon*, *supra*, 35 Cal.4th at p. 1172, fn. omitted.)

"To state a particular level beyond which punitive damages in a given case would be grossly excessive, and hence unconstitutionally arbitrary, ' "is not an enviable task. . . . In the last analysis, an appellate panel, convinced it must reduce an award of punitive damages, must rely on its combined experience and judgment." ' [Citation.]" (*Simon*, *supra*, 35 Cal.4th at p. 1188.) Moreover, our "constitutional mission is only to find a level higher than which an award may not go; it is not to find the 'right' level in the court's own view." (*Ibid.*)

2. Analysis

The United States Supreme Court has determined that the federal Due Process Clause places limits on state courts' awards of punitive damages, limits appellate courts are required to enforce in their review of jury awards. (*State Farm*, *supra*, 538 U.S. at pp. 416-418.) The imposition of "grossly excessive or arbitrary" (*id.* at p. 416) awards

is constitutionally prohibited, for due process entitles a tortfeasor to " 'fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.' " (*Id.* at p. 417.)

The United States Supreme Court and the California Supreme Court have stated that there are three factors to consider in determining whether the amount of a punitive damages award comports with the federal Due Process Clause: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the . . . harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages [and comparable civil penalties where available]." (*State Farm*, *supra*, 538 U.S. at p. 418; see *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191 [29 Cal. Rptr. 3d 401, 113 P.3d 82].) We discuss these factors in order.

Reprehensibility of conduct

Courts utilize five factors to help determine the degree of reprehensibility of a defendant's conduct: (1) whether the harm was physical and not merely economic; (2) whether the conduct demonstrated an indifference or reckless disregard for the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct was repeated or an isolated incident; and (5) whether the conduct was the result of intentional acts or mere accident. (*State Farm*, *supra*, 538 U.S. at p. 419; *Simon*, *supra*, 35 Cal.4th at p. 1180.) Further, the reprehensibility of a defendant's conduct is the most important indicator of the reasonableness of a punitive damages award. (*State Farm*, *supra*, 538 U.S. at p. 419; *Simon*, *supra*, 35 Cal.4th at p. 1180.)

Based upon our de novo review of the record, we conclude that the reprehensibility of Ford's conduct was high, given the catastrophic nature of Mrs. Wilson's injuries, Ford's reckless disregard for the safety of others, the repeated nature of Ford's conduct, and the fact that Ford's acts were intentional.

Focusing on the first factor, Ford's decision to release the defective Explorer resulted in catastrophic and permanent physical injuries to Mrs. Wilson, not merely economic loss. She is permanently paralyzed and in constant, debilitating, pain. She is confined to a wheelchair, without sensation or muscular control of her lower body. She must rely on others to care for her. As Mrs. Wilson explained it: "Me being dependent on other people . . . for me that is very difficult because I have always been an independent sort of person. . . . I have always been the one that has done things for other people. For me that is very hard to . . . have to be in that kind of position. . . . I am in a wheelchair, I am not going to ever be out of a wheelchair, that whole concept is very . . . difficult to . . . accept. . . . The things that I really love to do I can't do anymore. The list is just—goes on and on."

As discussed *ante*, and as found by the jury, Ford's decision to release the defective Explorer without warning consumers of the risk of injury it posed evinced a reckless disregard for the safety of its customers. As the trial court noted in ruling on Ford's motion for new trial on the ground the punitive damage award was excessive, "the evidence showed Ford had a pattern of deficient design regarding safety in favor of increased financial returns and was the result of the conscious disregard

of Ford executives." Our own independent review of the record compels the same conclusion. Thus, the second factor also supports a significant punitive damages award.

The target of the conduct in this case was consumers, individuals who were vulnerable as they would not understand vehicle design, development and manufacture, and would rely on Ford to inform them of risks as they made purchasing decisions.

Conduct is more reprehensible where, as here, it is part of repeated corporate policy or practice rather than an isolated incident. (*Johnson v. Ford Motor Co.*, *supra*, 35 Cal.4th at p. 1196.) In this case the conduct was repeated and not an isolated incident. Ford had a pattern of deficient safety design that was ignored in favor of increased financial returns. As discussed in more detail, *ante*, that corporate policy or practice was evidenced by Ford's refusal to follow its engineers' recommendations to improve the stability of the Explorer. As the trial court noted, "[T]hat evidence was primarily adduced through Ford's own internal memoranda and correspondence."

The evidence presented by the Wilsons in this case supports a finding that Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management, knowing the unreasonable risk of harm posed to consumers, as opposed to a mere accident.

Moreover, the fifth factor, whether the conduct was the result of intentional acts or mere accident, "is of little value in assessing a California punitive damages award, as accidentally harmful conduct cannot provide the basis for punitive damages under our law. At a minimum, California law requires

conduct done with 'willful and conscious disregard of the rights or safety of others' or despicable conduct done 'in conscious disregard' of a person's rights." (*Simon*, *supra*, 35 Cal.4th at p. 1181.) The jury's finding that Ford acted with "oppression, fraud or malice" demonstrates Ford's actions were intentional. In sum, the reprehensibility of Ford's conduct supports a significant award of punitive damages.

3. Ratio of punitive to compensatory damages

In *State Farm*, the United States Supreme Court, while still "declin[ing] . . . to impose a bright-line ratio which a punitive damages award cannot exceed," held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*State Farm*, *supra*, 538 U.S. at p. 425.) The high court "also explained that past decisions and statutory penalties approving ratios of three or four to one were 'instructive' as to the due process norm, and that while relatively high ratios could be justified when ' "a particularly egregious act has resulted in only a small amount of economic damages" [citation] . . . [t]he converse is also true. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.' " (*Simon*, *supra*, 35 Cal.4th at p. 1182.)

Our high court has interpreted this language from *State Farm* to mean that it established a "type of presumption: ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than 9

or 10 to 1 are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause." (*Simon*, *supra*, 35 Cal.4th at p. 1182, fn. omitted.)

Here, after our reduction of the noneconomic damages awarded to Mrs. Wilson, the compensatory damages, while substantial, are within a reasonable range for the type of catastrophic, permanent and ongoing injuries suffered by Mrs. Wilson, and the loss of her society, comfort and companionship to Mr. Wilson. Mrs. Wilson's recovery for noneconomic damages is proportionate to the injuries she suffered. Similarly, Mr. Wilson's recovery on his loss of consortium claim is proportionate to his substantial injury. Moreover, as discussed, *ante*, there was a high degree of reprehensibility to Ford's conduct. Because the noneconomic damages award is substantial, a low single digit ratio is appropriate. We are mindful of the Supreme Court's statement in *State Farm*, *supra*, 538 U.S. at page 425 that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." In this case we conclude that a two-to-one ratio is warranted because the degree of Ford's reprehensibility is also high.

4. Comparable civil penalties

Ford does not address this factor in its opening brief. However, for the first time in its reply brief Ford asserts that there are comparable civil penalties to compare with the amount of the punitive damages claim. Ford cites title 49 United States

Code section 30165(a) which it claims provides penalties for designing and selling defective vehicles, penalties that are $1,000 for each vehicle, up to a maximum of $800,000. Ford asserts that since the punitive damages award "dwarfs" the maximum penalties allowed under that federal statute, the punitive damage award is constitutionally infirm. This contention is unavailing.

First, we do not consider matters raised by appellants for the first time in their reply briefs. Because Ford did not address this factor in its opening brief, thus denying the Wilsons an opportunity to respond, it has waived the right to assert this issue on appeal. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761 [27 Cal. Rptr. 3d 648, 110 P.3d 903]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 [93 Cal. Rptr. 2d 364].)

Additionally, title 49 United States Code section 30165(a) is part of that portion of the Safety Act which provides, as discussed, *ante*, only minimum safety standards. Moreover, as also discussed in detail, *ante*, there is a savings clause that allows common law liability notwithstanding compliance with those standards, putting Ford on notice that it may be subject to private state actions that result in substantially higher damage awards than the civil penalties. The savings clause also evidences congressional intent that the maximum penalty allowed under title 49 United States Code section 30165 is not a sufficient penalty for all such violations because the varying degrees of plaintiffs' injuries and defendants' culpability dictate a greater

flexibility in punishment. (See *Ford Motor Co. v. Sperau* (Ala. 1997) 708 So. 2d 111, 122.)

Finally, the sanctions amounts in title 49 United States Code section 30165(a) were increased in 2000 to a range of $5,000 to $15 million, indicating Congress's belief that the original amounts were insufficient to deter vehicle manufacturers from placing defective automobiles on the road. The maximum penalty under the 2000 amendments is not "dwarfed" by the punitive damage award, as remitted.

5. Conclusion

Based upon the foregoing factors, and using our combined experience and judgment, we conclude that a two-to-one ratio of punitive damages to compensatory damages is sufficient to punish Ford and deter it from similar conduct in the future. This ratio is proportionate to the degree of harm suffered and the substantial award of compensatory damages. An award exceeding a two-to-one ratio would exceed the constitutional maximum that could be awarded under the facts of this case. (*Simon*, *supra*, 35 Cal.4th at p. 1188 [An appellate court's "constitutional mission is only to find a level higher than which an award may not go; it is not to find the 'right' level in the court's own view"].) Accordingly, we remit the punitive damage award to $55 million, approximately two times the total compensatory damage award to the Wilsons. If the Wilsons do not agree to the reduced amount, the matter will be reversed and remanded for a new trial on the issue of punitive damages, as specified in California Rules of Court, rule 24(d).

DISPOSITION

The judgment is affirmed in all respects except as to the award of noneconomic damages to Mrs. Wilson and punitive damages to the Wilsons. The award of noneconomic damages to Mrs. Wilson and punitive damages to the Wilsons is reversed and remanded for retrial on the issue of the amount of noneconomic and punitive damages, unless the Wilsons shall, within 30 days from the date this opinion is filed, file with the clerk of this court and serve upon Ford the Wilsons' written consent to a reduction of Mrs. Wilson's noneconomic damages award to $18 million and the Wilsons' punitive damage award to $55 million, in which event the judgment will be modified to award the Wilsons noneconomic and punitive damages in that amount, and which will result in a total reduced award of $82,606,004 ($4,606,004 in economic damages + $18 million in noneconomic damages + $5 million in loss of consortium + $55 million in punitive damages), and in which event the judgment will be affirmed in its entirety, as modified. (Cal. Rules of Court, rule 24(d).) The parties shall bear their own costs on appeal.

McConnell, P. J., and Irion, J., concurred.

APPENDIX D

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: August 19, 2004

DEPT. 63

PRESENT HON. Kevin A. Enright
JUDGE

CLERK:

Mary Ann Ybanez

GIC800836

BUELL-WILSON,
Plaintiffs

v.

FORD MOTOR COMPANY,
Defendants

MINUTE ORDER ON SUBMITTED MATTER: DEFENDANTS[']
MOTIONS FOR JNOV AND NEW TRIAL

Having taken Defendants Ford Motor Company and Drew Ford's Motion for JNOV under submission, the Court rules as follows:

Defendants Ford Motor Company and Drew Ford's Motion for JNOV is denied.

Plaintiffs' claims are not barred by the California Supreme Court holding in *Ramirez v. Plough* (1993) 6 Cal.4th 539. Defendants contend *Ramirez* requires

the Court to defer to and adopt the standards enacted by expert administrative agencies. In *Ramirez*, the issue was whether the manufacturer of over-the-counter medication could be liable for distributing its products with English-only labels when it was foreseeable non-English readers would be buying the products. In that instance, the Supreme Court held the standard for the duty of care was the administrative duty of care which only required warning labels in English. However, the Supreme Court also recognized that generally, statutory compliance is not a defense to tort liability. (*Id.* at 547-548.)

However, the current case is more consistent with *Buccery v. General Motors Corp.* (1976) 60 Cal.App.3d 533, cited with approval in Ramirez. In *Buccery*, the plaintiff was involved in a motor vehicle accident where the impact caused the rear of plaintiff's head to strike the rear window of his pick-up truck. Plaintiff sued the manufacturer for design defect for its failure to install head restraints. The Court of Appeal held compliance with federal safety standards does not preclude imposition of common law liability for a defective product and that federal regulations are supplementary to the common law of products liability. (*Id.* at 540-541.) The Buccery case is more analogous to the facts of this case and thus, Plaintiffs' claims are not barred.

Neither are Plaintiffs' claims preempted by federal law. 49 USCA §30103(b) addresses the issue of preemption and states:

> Preemption (1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a state may prescribe or

> continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

That same statute also includes a savings clause which states:

> Common law liability.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law. (49 USC §30103(e).)

In this case, with regard to the issue of stability, there is no applicable federal standard in place which would preempt Plaintiffs' state tort claims. Ford cites to the National Highway Traffic Safety Administration's ("Safety Administration") rejection of the use of the Stability Index, however, the non-existence of the safety standard cannot preclude state tort claims under these statutes.

Ford argues that since the Safety Administration has failed to adopt the use of the Stability Index as a standard, Plaintiffs are precluded from using the Stability Index to show a defect. Ford relies on *Geier v. American Honda Motor Company* (2000) 529 U.S. 861, where the plaintiff sued the vehicle

manufacturer for failure to equip the vehicle with airbags. The Supreme Court held the action was preempted since it actually conflicted with the Department of Transportation standard requiring manufacturers to place driver's side airbags in some, but not all 1987 automobiles. Unlike *Geier*, since the Safety Administration did not adopt a stability standard, there is no federal standard with which to conflict, and Plaintiffs' claims are not preempted.

With regard to the roof strength, Ford asserts the Explorer meets the requirements of Federal Motor Vehicle Safety Standard ("FMVSS") 216. However, the FMVSS is a minimum standard and does not preclude a finding of a product defect. The savings clause in 49 U.S.C. § 30103 is meant to leave room for state law claims, especially in cases such as this where the federal safety standard is a minimum safety standard. (*Geier* at 868.)

Substantial evidence supports the jury's verdict that Defendant Drew Ford failed to warn the Wilsons of the Explorer's dangerous propensities. Mrs. Wilson testified she asked the salesmen whether the Explorer would rollover and also that she would not have bought the vehicle if she had been told there was a danger of rollover. Further the Wilsons testified no one at Drew Ford warned them regarding proper inflation of the tires. In fact, the Drew Ford employees testified they did not know the proper tire pressure. Therefore, there is substantial evidence to support the judgment on the failure to warn issue.

Substantial evidence also supports the jury's verdict that Defendant Ford failed to warn of the crashworthiness of the roof related structure. Plaintiffs' expert Mr. Forrest testified weaker A-

pillars and B-pillars were used in the Explorer which resulted in the Explorer having a propensity to collapse in a rollover collision. The evidence showed Ford was aware of such. Ford was not found liable on the issue of failure to warn with regard to stability. (Special Verdict No. 7.)

With regard to the compensatory damages, Plaintiffs presented substantial evidence to support the Wilsons' non-economic damage claims, including the difficulties of their daily life and the past, current and future physical pain Mrs. Wilson endures.

Ford argues judgment should be granted in favor of Ford on the issue of punitive damages because at most, Plaintiffs showed reasonable people disagree on the design of the Explorer. However, Plaintiff presented clear and convincing evidence Ford acted with malice and that Ford acted with a conscious disregard for the safety of others. Even if there was a disagreement between reasonable experts, it does not negate the clear and convincing evidence that Ford acted with malice. Therefore, the motion for JNOV of the issue of punitive damages on this basis is denied.

In addition, Ford argues punitive damages should not be awarded because Civil Code §3294 violates Ford's due process rights. The Ford Explorer met all of the national safety requirements and thus, Ford had no notice of what acts would subject it to punitive damages. First, applying or redrafting Civil Code §3294 as suggested by Ford would require articulating all conduct that is despicable and obviate the plain meaning of the statute. Furthermore, Ford continues to focus on the product and not the process by which the Explorer was developed. Ford cannot protect itself by arguing the vehicle meets all applicable safety standards when

there is evidence Ford knew of potentially fatal defects during the development and manufacture of the vehicle not addressed by the safety standards and chose not to remedy those problems. Such acts constitute despicable conduct and expose Ford to the prospect of punitive damages.

It is obvious the punitive damages awarded were twice the amount of compensatory damages awarded. The US Supreme Court held that single-digit multipliers of the compensatory damages comport with due process while still achieving a state's goal of deterrence and retribution. (*State Farm v. Campbell* (2002) 538 U.S. 408, 425.) The Supreme Court stated *State Farm*'s out-of-state conduct could not justify a 145-1 compensatory to punitive damage award and *State Farm* should only be punished for its conduct directed at the plaintiffs. (*Id.* at 426-427.)

Ford argues that the case of *People v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253 holds that nationwide financial figures cannot serve as a basis for punitive damages in California. However, the *R.J. Reynolds* case involved substantially different circumstances. The State of California and R.J. Reynolds had settled a case regarding the tobacco company's advertising to minors. In that case, the State of California was requesting punitive damages for R.J. Reynolds' violation of a Master Settlement Agreement in the amount of $20 million, which represented 10 percent of Reynolds' nationwide advertising spending. No compensatory damages were awarded, therefore the measure of punitive damages could not be calculated based on a single-digit multiplier. In that case, it is clear the only basis for punitive damages was the in-

state financial figures of R.J. Reynolds. In this case, however, the punitive damages were within the single-digit multiplier limit set forth in *State Farm*, and the punitive damage verdict is not unconstitutional.

Furthermore, the focus on just the injuries incurred by the plaintiffs does not serve as an evidentiary limitation on financial information. (*Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, fn. 7.) "Evidence of defendant's financial condition is not unlawful or inappropriate under *State Farm*." (*Id.*) Thus, Plaintiffs' presentation of the net worth of Ford was not improper.

In addition, the Court has ordered a remittitur in the context of Ford's motion for a new trial.

Plaintiffs' evidentiary objections to the declaration of William Thomson are overruled.

Defendants' request for judicial notice of Exhibits 2-4, 8, 10-24 and 40-42 is granted and the remaining requests are denied.

Defendants' request for judicial notice of Exhibit 3 to the Supplemental Notice of Lodgment is granted.

Defendant's request for judicial notice of Exhibit 4 to the Supplemental Notice of Lodgment is denied. (Ford's Reply, footnote 6.)

Defendants' evidentiary objections to the declaration of James Iagmin are overruled.

Defendants' evidentiary objections to the declaration of Allan Kam are sustained.

MOTION FOR NEW TRIAL

Having taken Defendants Ford Motor Company and Drew Ford's Motion for a New Trial under submission, the Court rules as follows:

Defendants Ford Motor Company and Drew Ford's Motion for a New Trial is granted on the issue of damages only on the ground of excessive damages subject to the condition the motion for a new trial is denied if the Plaintiffs consent to a reduction of damages.

The Court finds that the damages awarded are excessive. Therefore, a remittitur is appropriate. The Court does not find that the jury rendered its verdict due to passion or prejudice. Pursuant to Code of Civil Procedure section 662.5(b), the Court grants a new trial on the issue of damages only on the ground of excessive damages subject to the condition that the motion for a new trial is denied if the plaintiffs consent to a reduction of those damages. In exercising its independent judgment as to what are fair and reasonable damages based upon the evidence and law, the Court finds that the compensatory damages awarded to plaintiff Benetta Buell-Wilson should be reduced to $70,000,000, the compensatory award to plaintiff Barry Wilson should be reduced to $5,000,000, and the punitive damage award to both should be reduced to $75,000,000, making the total award $150,000,000.

This order is based on the following reasons:

The evidence, in the Court's opinion, is insufficient to support a compensatory damage verdict in favor of Ms. Buell-Wilson in the amount of $109,606,004. In reaching that finding and the other findings on the verdict on damages, the Court has weighed the evidence, including reasonable inferences therefrom, and is convinced from the

entire record the jury clearly should have reached a different verdict on damages. That same evidence, however, recited below, is sufficient to support a compensatory damage award in favor of Ms. Buell-Wilson in the amount of $70,000,000.

In determining what is fair and reasonable, there is no question that reasonable minds can differ. In exercising its independent judgment, the Court has considered all the evidence presented by both sides.

The jury obviously found that both plaintiffs were excellent witnesses on their own behalf. The Court agrees. Both were forthright and sincere. Neither exaggerated either the injuries Mrs. Buell-Wilson sustained in the accident or the circumstances resulting therefrom.

Ms. Buell-Wilson's back was broken in the accident. Paraplegia at the level of T12 has resulted in no function or sensation in her lower body. That is permanent.

The jury found that Ms. Buell-Wilson's past economic loss amounted to $573,348 and her future economic loss amounted to $4,032,656. Those figures are not in dispute in this motion.

With regard to her non-economic damages, the plaintiff testified that before the accident she was an avid outdoors person and led an active and rewarding life. She has a black belt in karate. She frequently hiked and camped with her family.

Following the accident, Ms. Buell-Wilson remained hospitalized for approximately two months. Her doctors testified that she suffers constant aching in her back where surgically implanted rods remain. She experiences stabbing

and shooting pain over her right side. Her pain will increase over the rest of her life.

She suffers from a neurogenic bladder and bowel. While hospitalized, she suffered four urinary tract infections. Those have been recurring and could potentially be fatal. Due to her lack of sensation and control in her genital area and buttocks, her ability to recognize infection is lessened. Such infections will require hospitalization in the future. Because Ms. Buell-Wilson has no control of her bowel and bladder, she must manually extract fecal matter and catheterize herself several times each day.

Ms. Buell-Wilson's shoulder joints are rapidly degenerating and cause and will continue to cause her a significant amount of pain due to the frequent transfers to and from her wheelchair each day. She is unable to reach her second-story bedroom and must sleep in the laundry room in the garage of her home. Ms. Buell-Wilson can no longer perform the active volunteer work in which she engaged before the accident. All of this evidence was mostly uncontroverted.

As for the compensatory award to Mr. Wilson, the evidence is insufficient to support a compensatory damage verdict in favor of Mr. Wilson in the amount of $13,000,000 for loss of consortium. That same evidence, however, is sufficient to support a compensatory damage award in his favor in the amount of $5,000,000.

Mr. Wilson is his wife's caretaker. To help prevent pressure sores, Mr. Wilson rolls his wife over in bed on occasion each night. He assists her with wheelchair transfers and catheterizations. The intimate life he and his wife shared has been lost. They no longer hike and camp together.

While the Court finds the verdict of the compensatory damages in favor of Ms. Buell-Wilson and Mr. Wilson to be excessive, the Court finds that the compensatory awards to both, as reduced, are fair and reasonable in the exercise of its independent judgment. Those determinations are based upon the reasons mentioned above, which highlight the evidence on damages presented at trial.

The Court finds the punitive damages verdict to be excessive as well and reduces the punitive damages award to $75,000,000. The reasons are as follows:

The evidence is insufficient to support a punitive damages verdict in the favor of the Wilsons in the amount of $246,000,000. That same evidence, however, is sufficient to support a punitive damages award in the amount of $75,000,000.

In evaluating the punitive damages, the courts must consider three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408,418. In analyzing those three guideposts, the Court concludes the punitive damages award must be reduced.

Substantial evidence supports the finding of malice on the part of Ford and a high degree of reprehensibility. The degree of reprehensibility is determined by considering whether:

> [T]he harm caused was physical as opposed to economic; the tortious conduct" evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. (*Id.* at 419.)

In considering these factors, the evidence showed Ford had a pattern of deficient design regarding safety in favor of increased financial returns and was a result of the conscious disregard of Ford executives. That evidence was primarily adduced through Ford's own internal memoranda and correspondence. This conduct was reprehensible and weighs in favor of punitive damages.

The remittitur reduces the punitive damage award to a one-to-one ratio relative to the compensatory award. This is well within the second guidepost set forth by the Supreme Court. Even as reduced, the compensatory damage award is large. When compensatory awards are substantial, a ratio of equal to the compensatory damages is within the limits of the due process guarantee. (*Id.* at 425.) The punitive damages are fair and reasonable and proportionate to the amount of harm suffered by the Plaintiffs.

With regard to the third guidepost, the harm suffered by Ms. Buell-Wilson could have resulted in criminal penalties although that fact alone does not warrant the imposition of punitive damages. (*Id.* at 428.) The statutory penalties for a non-compliant

and defective vehicle do not fully address potential physical or fatal injury to victims. After consideration of the criminal and civil penalties, the Court concludes neither a higher or lower ratio between the compensatory and punitive damage awards, as reduced, are required.

With regard to the evidentiary issues as a basis for a new trial, the motion for new trial is denied.

The safety records of other vehicles were properly excluded. A product is defective if the product fails to perform as safely as an ordinary consumer would expect when used in the intended manner or where there is risk of danger inherent in the design which outweighs the benefits of that design. (*Barker v. Lull Engineering Co., Inc.* (1978) 20 Cal.3d 413.) Ford advocates that evidence of the safety of other SUVs is necessary to show the safety of the Ford Explorer. However, under the *Barker* analysis, the only issue is the safety of the Explorer. "In a strict products liability case, industry custom or usage is irrelevant to the issue of defect." (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 803.) The issue is whether the product is defective, not whether it is better than the other products on the market.

Ford argues the Bronco II evidence should have been excluded. Evidence of a predecessor model's defect is admissible only if the other version and current version are substantially similar. The Plaintiffs are not required to prove the Bronco II was exactly the same as the 1997 Ford Explorer driven by Mrs. Wilson, only that they are substantially similar. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 404.) In the instance where the evidence is offered to show the defendant had notice, a lesser showing of similarity is necessary. (*Id.*; *Laird v. T.*

W. Mather Inc. (1958) 51 Cal.2d 210, 220.) The determination of whether the previous model is substantially similar is left to the trial judge. (*Jensen v. Southern Pacific Co.* (1954) 129 Cal.App.2d 67, 74.) In this case, Plaintiffs presented substantial evidence of the design carry-over from the Bronco II to the Explorer, evidence of the intermingling of the development and testing of the Bronco II and the Explorer and the similar source of rollover problems between the Bronco II and Explorer for the Court to find the two vehicles are substantially similar.

If Plaintiffs accept the remittitur, Plaintiffs shall submit an amended judgment to the Court.

Plaintiffs' objections to the declaration of Ann Cochran are overruled.

Plaintiffs' objections to the declaration of Richard Serafini are overruled.

Plaintiffs' objections to the declarations of George L. Priest and W. Kip Viscusi are sustained.

Defendants' objections to the declarations of Dennis Schoville and Louis Amell are overruled.

IT IS SO ORDERED.

Dated: August 19, 2004

KEVIN A. ENRIGHT

KEVIN A. ENRIGHT
Judge of the Superior Court

APPENDIX E

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

BENETTA BUELL-WILSON;
BARRY S. WILSON,
Plaintiffs,

v.

FORD MOTOR COMPANY,
a Delaware Corporation;
DREW FORD, a California Corporation,
Defendants.

Case No. GIC800836

June 25, 2004

JUDGMENT ON SPECIAL VERDICT

This action came on regularly for trial on March 15, 2004, in Department 63 of the San Diego Superior Court, the Honorable Kevin A. Enright, Judge presiding; plaintiffs Benetta Buell-Wilson and Barry S. Wilson appearing by Dennis A. Schoville and Louis G. Arnell of Schoville & Arnell, LLP, and defendants Ford Motor Company and Drew Ford appearing by Ronald E. Cabaniss, Rand Wallis and Todd Croftchik of Cabaniss Smith Toole & Wiggins and Anthony Sonnett of Yukevich & Sonnett.

A jury of twelve persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel,

the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to-wit:

We answer the questions submitted to us as follows:

1. Did the 1997 Ford Explorer have a defect in its design as to its stability?

x Yes ___No

If your answer to Question No. 1 is "Yes", then answer Question Nos. 2 and 3. If your answer to Question No. 1 is "No", then answer Question No. 4.

2. Was the defect in design as to the stability of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

x Yes ___No

Answer Question No. 3.

3. Was the defect in design as to the stability of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

x Yes ___No

Answer Question No. 4.

4. Was there a defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer?

x Yes ___No

If your answer to Question No. 4 is "Yes", then answer Question Nos. 5 and 6. If your answer to Question No. 4 is "No", then answer Question No. 7.

5. Was the defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

x Yes ___No

Answer Question No. 6.

6. Was the defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

x Yes ___No

Answer Question No. 7.

7. Did Ford Motor Company fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the stability of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

___Yes x No

If your answer to Question No. 7 is "Yes", then answer Question Nos. 8 and 9. If your answer to Question No. 7 is "No", then answer Question No. 10.

8. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Benetta Wilson?

___Yes ___No

Answer Question No. 9.

9. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Barry Wilson?

___Yes ___No

Answer Question No. 10.

10. Did Ford Motor Company fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

_x_ Yes ___No

If your answer to Question No. 10 is "Yes", then answer Question Nos. 11 and 12. If your answer to Question No. 10 is "No", then answer Question No. 13.

11. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

_x_ Yes ___No

Answer Question No. 12.

12. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

x Yes ___No

Answer Question No. 13.

13. Did Drew Ford fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the stability of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

x Yes ___No

If your answer to Question No. 13 is "Yes", then answer Question Nos. 14 and 15. If your answer to Question No. 13 is "No", then answer Question No. 16.

14. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Benetta Wilson?

x Yes ___No

Answer Question No. 15.

15. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Barry Wilson?

x Yes ___No

Answer Question No. 16.

16. Did Drew Ford fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

x Yes ___No

If your answer to Question No. 16 is "Yes", then answer Question Nos. 17 and 18. If your answer to Question 16 is "No", then follow the instructions after Question No. 18 below.

17. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

x Yes ___No

Answer Question No. 18.

18. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

x Yes ___No

Follow the instructions below:

If your answer to any of Question Nos. 2, 5, 8, 11, 14 or 17 is "Yes", then answer Question No. 19. If your answer to any of Question Nos. 3, 6, 9 12, 15 or 18 is "Yes", then answer Question No. 20. Otherwise, stop here, answer no further questions, and have the presiding juror sign and date this form.

19. What are Benetta Wilson's damages?

a. Past economic loss, including lost earnings, lost earning capacity and past medical expenses: $ 573,348

b. Future economic loss, including lost earnings, lost earning capacity and medical expenses: $ 4,032,656

c. Past non-economic loss, including (but not limited to) physical and mental pain and suffering; and loss of enjoyment of life: $ 6,000,000

d. Future non-economic loss, including (but not limited to) physical and mental pain and suffering; and loss of enjoyment of life: $ 99,000,000

20. What are Barry Wilson's damages?

a. Past loss of companionship, comfort, care, society, assistance, affection, moral support and the loss of sexual relations: $ 3,000,000

b. Future loss of companionship, comfort, care, society, assistance, affection, moral support and the loss of sexual relations: $ 10,000,000

Answer Question No. 21.

21. Did Ford Motor Company act with oppression or fraud or malice?

x Yes ___ No

Signed: Lisa M. Corrie
Presiding Juror

Dated: 6-1-04

After the above verdict on special issues was returned, the same jury of twelve persons was impaneled for the purpose of deciding punitive damages. One witness was sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issue submitted to the jury and the answer given thereto by the jury, which said verdict was in words and figures as follows, to wit:

We, the jury in the above-entitled action, find as follows:

1. What amount of punitive damages, if any, do you award to plaintiffs, Benetta Buell-Wilson and Barry S. Wilson, against Defendant Ford Motor Company?

$ 246,000,000

Dated: June 3, 2004

Lisa M. Corrie

FOREPERSON

It appearing by reason of special verdict that plaintiff Benetta Buell-Wilson is entitled to judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $109,606,004; and Barry Wilson is entitled to judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount

of $13,000,000; and it further appearing by reason of special verdict that plaintiffs Benetta Buell-Wilson and Barry Wilson, jointly, are entitled to judgment against defendant Ford Motor Company for punitive damages in the amount of $246,000,000.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

That plaintiff Benetta Buell-Wilson have judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $109,606,004.

That plaintiff Barry Wilson have judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $13,000,000.

That plaintiffs Benetta Buell-Wilson and Barry Wilson, jointly, have judgment against defendant Ford Motor Company for punitive damages in the amount of $246,000,000.

Plaintiffs shall recover costs in the amount of $__.

Dated: JUN 25 2004/s/ KEVIN A. ENRIGHT

Hon. Kevin A. Enright

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

BENETTA BUELL-WILSON, et al.,
Plaintiffs and Appellants,

v.

FORD MOTOR COMPANY,
Defendant and Appellant.

Case No. GIC800836 September 3, 2004

AMENDED JUDGMENT ON SPECIAL VERDICT

This action came on regularly for trial on March 15, 2004, in Department 63 of the San Diego Superior Court, the Honorable Kevin A. Enright, Judge presiding; plaintiffs Benetta Buell-Wilson and Barry S. Wilson appearing by Dennis A. Schoville and Louis G. Arnell of Schoville & Arnell, LLP, and defendants Ford Motor Company and Drew Ford appearing by Ronald E. Cabaniss, Rand Wallis and Todd Croftchik of Cabaniss Smith Toole & Wiggins and Anthony Sonnett of Yukevich & Sonnett.

A jury of twelve persons was regularly impaneled and sworn. Witnesses were sworn and testified.

After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to-wit:

We answer the questions submitted to us as follows:

1. Did the 1997 Ford Explorer have a defect in its design as to its stability?

__x__Yes ____No

If your answer to Question No. 1 is "Yes", then answer Question Nos. 2 and 3. If your answer to Question No. 1 is "No", then answer Question No. 4.

2. Was the defect in design as to the stability of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

__x__Yes ____No

Answer Question No. 3.

3. Was the defect in design as to the stability of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

__x__Yes ____No

Answer Question No. 4.

4. Was there a defect in the crashworthiness design of the roof

related structure of the 1997 Ford Explorer?

__x__Yes ____No

If your answer to Question No. 4 is "Yes", then answer Question Nos. 5 and 6. If your answer to Question No. 4 is "No", then answer Question No. 7.

5. Was the defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

__x__Yes ____No

Answer Question No. 6.

6. Was the defect in the crashworthiness design of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

__x__Yes ____No

Answer Question No. 7.

7. Did Ford Motor Company fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the stability of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

____Yes __x__No

If your answer to Question No. 7 is "Yes", then answer Question Nos. 8 and 9. If 'our answer to Question No. 7 is "No", then answer Question No. 10.

8. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Benetta Wilson?

____Yes ____No

Answer Question No. 9.

9. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Barry Wilson?

____Yes ____No

Answer Question No. 10.

10. Did Ford Motor Company fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

__x__Yes ____No

If your answer to Question No. 10 is "Yes", then answer Question Nos. 11 and 12. If your answer to Question No. 10 is "No", then answer Question No. 13.

11. Was Ford Motor Company's failure to adequately warn Benetta

Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

__x__Yes ____No

Answer Question No. 12.

12. Was Ford Motor Company's failure to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

__x__Yes ____No

Answer Question No. 13.

13. Did Drew Ford fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger related to the stability of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

__x__Yes ____No

If your answer to Question No. 13 is "Yes", then answer Question Nos. 14 and 15. If your answer to Question No. 13 is 'No", then answer Question No. 16.

14. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger

related to the 997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Benetta Wilson?

__x__ Yes ____ No

Answer Question No. 15.

15. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the 1997 Ford Explorer's stability a substantial factor in causing harm to plaintiff Barry Wilson?

__x__ Yes ____ No

Answer Question No. 16.

16. Did Drew Ford fail to adequately warn Benetta Wilson and Barry Wilson about a substantial danger posed by the crashworthiness of the roof related structure of the 1997 Ford Explorer that would not have been recognized by the ordinary consumer?

__x__ Yes ____ No

If your answer to Question No. 16 is "Yes", then answer Question Nos. 17 and 18. If your answer to Question 16 is "No", then follow the instructions after Question No. 18 below.

17. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Benetta Wilson?

__x__ Yes ____ No

Answer Question No. 18.

18. Was Drew Ford's failure to adequately warn Benetta Wilson and Barry Wilson of a substantial danger related to the crashworthiness of the roof related structure of the 1997 Ford Explorer a substantial factor in causing harm to plaintiff Barry Wilson?

__x__ Yes ____ No

Follow the instructions below:

If your answer to any of Question Nos. 2, 5, 8, 11,14 or 17 is "Yes", then answer Question No. 19. If your answer to any of Question Nos. 3, 6, 9 12, 15 or 18 is "Yes", then answer Question No. 20. Otherwise, stop here, answer no further questions, and have the presiding juror sign and date this form.

19. What are Benetta Wilson's damages?

a. Past economic loss, including lost earnings, lost earning capacity and past medical expenses:

$573,348

b. Future economic loss, including lost earnings, lost earning capacity and medical expenses:

$4,032,656

c. Past non-economic loss, including (but not limited to) physical and mental

pain and suffering; and loss of enjoyment of life:

$6,000,000

d. Future non-economic loss, including (but not limited to) physical and mental pain and suffering; and loss of enjoyment of life:

$99,000,000

20. What are Barry Wilson's damages?

a. Past loss of companionship, comfort, care, society, assistance, affection, moral support and the loss of sexual relations:

$3,000,000

b. Future loss of companionship, comfort, care, society, assistance, affection, moral support and the loss of sexual relations:

$10,000,000

Answer Question No. 21.

21. Did Ford Motor Company act with oppression or fraud or malice?

__x__ Yes ____ No

Signed: Lisa M. Corrie
Presiding Juror

Dated: 6-1-04

After the above verdict on special issues was returned, the same jury of twelve persons was impaneled for the purpose of deciding punitive damages. One witness was sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issue submitted to the jury and the answer given thereto by the jury, which said verdict was in words and figures as follows, to wit:

We, the jury in the above-entitled action, find as follows:

> 1. What amount of punitive damages, if any, do you award to plaintiffs, Benetta Buell-Wilson and Barry S. Wilson, against Defendant Ford Motor Company? $246,000,000

Dated: June 3, 2004 Lisa M. Corrie
FOREPERSON

By reason of said special verdict, on June 25, 2004, plaintiff Benetta Buell-Wilson had judgment entered against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $109,606,004; plaintiff Barry Wilson had judgment entered against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $13,000,000; and plaintiffs Benetta Buell-Wilson and Barry Wilson, jointly, had judgment entered against defendant Ford Motor Company for punitive damages in the amount of $246,000,000.

Following entry of judgment, defendants Ford Motor Company and Drew Ford filed Motions for JNOV and for New Trial. After briefing by all parties, and oral argument, on August 19, 2004, the Court issued its written Minute Order. Pursuant to he Minute Order, defendants Ford Motor Company and Drew Ford's Motion for JNOV was denied; defendants Ford Motor Company and Drew Ford's Motion for a New Trial was granted on the issue of damages only on the ground of excessive damages subject to the condition the Motion for a New Trial would be denied if the plaintiffs consented to reduction of damages, as follows:

> Plaintiff Benetta Buell-Wilson's compensatory damages reduced from $109,606,004 to $70,000,000;
>
> Plaintiff Barry Wilson's compensatory damages reduced from $13,000,000 to $5,000,000;
>
> Punitive damages reduced from $246,000,000 to $75,000,000.

Plaintiffs Benetta Buell-Wilson and Barry Wilson, having accepted the Court's remittitur,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

That plaintiff Benetta Buell-Wilson have judgment against Ford Motor Company and Drew Ford, jointly and severally, in the amount of $70,000,000.

That plaintiff Barry Wilson have judgment against defendants Ford Motor Company and Drew Ford, jointly and severally, in the amount of $5,000,000.

That plaintiffs Benetta Buell-Wilson and Barry Wilson, jointly, have judgment against defendant Ford Motor Company for punitive damages in the amount of $75,000,000.

Plaintiffs shall recover costs in the amount of $_____.

Dated: September 3, 2004

_____

Hon. Kevin A. Enright

APPENDIX G

CIVIL CODE

Division 4. General Provisions

Part 1. Relief

Title 2. Compensatory Relief

Chapter 1. Damages in General

Article 3. Exemplary Damages

Cal Civ Code § 3294

§ 3294. When permitted

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of

an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Chapter 4 (commencing with Section 377.10) of Title 3 of Part 2 of the Code of Civil Procedure based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377.62 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by Chapter 1498 of the Statutes of 1987 apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

143 (6)

No. 09-297

Supreme Court, U.S.
FILED
OCT 23 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

OCTOBER TERM 2009

FORD MOTOR COMPANY,
Petitioner,

v.

BENETTA BUELL-WILSON AND BARRY S. WILSON,
Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Ford's Petition offers a one-sided account of the facts and evidence. The Court of Appeal's opinion fairly summarizes the events that led to this litigation, including the Wilsons' catastrophic injuries, and the evidence presented at trial. Pet. App. 6a-17a.

The Wilsons sued Ford after Mrs. Wilson was crushed and rendered paraplegic when her Ford Explorer rolled over and the roof failed. The jury awarded Mrs. Wilson $109.6 million, and Mr. Wilson $13 million, in compensatory damages. *Id.* at 17a, 33a. It also awarded $246 million in punitive damages. *Id.* at 18a. The trial court reduced the compensatory damages to $70 million for Mrs. Wilson and $5 million for Mr. Wilson, and the punitive damages to $75 million. *Id.* at 19a-20a.

The Court of Appeal affirmed the finding of liability but further reduced both compensatory and punitive damages. Noting that Ford had not challenged the sufficiency of the evidence (*id.* at 11a), the court described the history of the Explorer's design. Ford based the Explorer on a prior SUV (the Bronco II) with a terrible history of instability and susceptibility to rollovers. *Id.* at 10a-13a. Although Ford knew of these problems, it retained critical Bronco II design elements bearing on stability (a narrow track width and high engine mount and center of gravity) and carried over a high percentage of parts from the Bronco II, while rebranding it as the Explorer. *Id.* at 12a-13a. Because making the necessary design changes would have delayed the Explorer's release date, Ford management rejected repeated requests by its engineers to increase the vehicle's track width and lower its center of gravity, thereby preserving a lethal feature of the Bronco II. *Id.* at 12a-14a. For cosmetic reasons, management also increased the Explorer's tire size, exacerbating the vehicle's instability. *Id.* at 14a. In subsequent years, as it modified the Explorer's design, Ford management again declined for

economic reasons to improve the Explorer's stability. *Id.* at 15a-16a.

The Explorer was not just unstable; it also had a weak roof structure prone to crush in a rollover. *Id.* at 11a, 16a. Rollovers in vehicles with sturdy roofs are relatively nonviolent events for passengers who are properly restrained (as was Mrs. Wilson). *Id.* at 16a. Ford could have significantly strengthened the roof for about $20 per vehicle. *Id.*

The Court of Appeal upheld Mr. Wilson's $5 million compensatory damage award and Mrs. Wilson's $4.6 million economic damage award, but reduced her noneconomic damages to $18 million. *Id.* at 43a-45a, 73a, 119a. The Petition does not challenge the resultant $27.6 million award of compensatory damages.

With respect to punitive damages, the court found that Ford had known that the vehicle was dangerously unstable and prone to rollover in normal driving conditions; had known that the roof structure was weak and prone to collapse in a rollover; and had known of technologically and economically feasible ways to stabilize the vehicle and strengthen its roof but chose for financial reasons not to do so. *Id.* at 52a-53a. The court also found that Ford had "evinced a reckless disregard for the safety of its customers" and had engaged in "'a pattern of deficient design regarding safety in favor of increased financial returns and was the result of the conscious disregard of Ford executives.'" *Id.* at 68a-69a. It added that "Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management, knowing the unreasonable risk of harm posed to consumers, as opposed to a mere accident." *Id.* at 69a. Consequently, it concluded that "the reprehensibility of Ford's conduct was high." *Id.* at 67a; *accord*, *id.* at 71a.

Nevertheless, the court reduced the punitive damages to $55 million, a ratio of essentially 2:1. *Id.* at 73a. It noted this Court's comment in *State Farm* that "'[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal

to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Id.* at 71a (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). In this case, however, it concluded "that a two-to-one ratio is warranted because the degree of Ford's reprehensibility is also high." *Id.* It added that "[a]n award exceeding a two-to-one ratio would exceed the constitutional maximum . . . under the facts of this case." *Id.* at 73a.

Ford filed a Petition for Review in the California Supreme Court which was summarily denied. Pet. 7. This Court then granted certiorari and remanded the case to the California Court of Appeal for reconsideration in light of *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) ("*Williams I*"). 550 U.S. 931 (2007). On remand, the Court of Appeal held that Ford had failed to preserve the third-party harm issue raised in *Williams*, and had therefore forfeited its right to assert it, in three distinct ways: (1) Ford failed to propose a legally correct instruction dealing with the issue of third-party harm (Pet. App. 77a-92a); (2) on appeal, Ford failed to raise any issue regarding the failure to give a third-party harm instruction (*id.* at 95a-98a); and (3) it likewise failed to raise that issue in its Petition for Review to the California Supreme Court. *Id.* Ford's Petition does not attack this aspect of the Court of Appeal's opinion, or otherwise raise the third-party harm issue. Accordingly, Ford has abandoned the issue that was the subject of the Court's prior GVR order.

The California Supreme Court initially granted Ford's second Petition for Review but deferred briefing or a decision pending disposition of the second *Philip Morris USA v. Williams* case. When this Court dismissed the writ in *Williams II* as improvidently granted (129 S. Ct. 1436 (2009)), the California Supreme Court dismissed review. Pet. App. 120a.

REASONS FOR DENYING THE PETITION

Ford has not challenged the judgment insofar as it awards compensatory damages for marketing a defective and dangerous product. Instead, the Petition targets only the punitive damages award, and rests on only a single ground: the asserted vagueness of California's punitive damages law as applied to the particular facts of this case.

The Petition should be denied. Once again, Ford seeks to raise an issue that it failed to preserve in the California courts: although the original Court of Appeal opinion rejected Ford's vagueness contentions, Ford failed to properly present that issue in its original Petition for Review to the California Supreme Court. Ford claims that it preserved the vagueness/fair notice issue by mentioning it in a footnote. However, California law requires that an issue be raised in the text of the brief, under an appropriate topic heading; issues raised only in a footnote are disregarded. Moreover, to raise an issue for discretionary review in the California Supreme Court, it must be included in a concise statement of the issues presented. Ford did not comply with any of these requirements. And while it subsequently attempted to resurrect that forfeited issue by raising it on remand to the Court of Appeal, that court properly held that the only issue before it as a result of this Court's GVR order was the third-party harm issue raised by *Williams I* and now abandoned by Ford. *See* Part I, *infra*.

In any event, the Court of Appeal's rejection of Ford's as-applied vagueness argument presents no issue meriting certiorari. The jury and the Court of Appeal found that Ford had knowingly sold a dangerous and defective vehicle that could have been made safe for a modest amount. California law gave clear notice by statute—and in decisional law (including several cases involving Ford)—that such conduct could subject a manufacturer to punitive damages. Ford identifies no conflict between the decision below and any decision of this Court, a federal Court of Appeals, or the highest court of a

state. Indeed, three decisions of this Court have rejected similar vagueness challenges to punitive damages awards. *See* Part II, *infra*. Certiorari should be denied.

I.

FORD DID NOT RAISE THE ISSUE PRESENTED AT EVERY STAGE OF THE STATE PROCEEDINGS.

The vagueness issue Ford now seeks to raise was presented at trial and in the Court of Appeal. Pet. 5-7. However, Ford's representation that it "again rais[ed] its as-applied vagueness challenge" in its original Petition for Review to the California Supreme Court (*id.* at 7) is inaccurate. Its failure to do so forfeited the issue as a matter of California law, and nothing Ford did thereafter could revive it.

Under well-established California rules regarding petitions for discretionary review in the Supreme Court, a Petition for Review "must begin with a concise, nonargumentative statement of the issues presented for review." CAL. R. CT. 8.504(b)(1); *compare* S. CT. R. 14.1(a) (imposing similar requirement on petitions for writs of certiorari). The California Supreme Court ordinarily does not consider issues not expressly raised or fairly included therein. CAL. R. CT. 8.520(b)(2), (3); *see, e.g.*, *People v. Villa*, 45 Cal. 4th 1063, 1076 (2009); *Ebbetts Pass Forest Watch v. California Dep't of Forestry & Fire Prot.*, 43 Cal. 4th 936, 951 n.5 (2008); *Wilson v. 21st Century Ins. Co.*, 42 Cal. 4th 713, 726 (2007); *compare, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 128 S. Ct. 999, 1011 (2008) (similar rule in this Court).

Ford does not even claim to have met this requirement, and for good reason. Its Petition for Review identified three "Issues Presented" on which review was sought. *A federal vagueness/"fair notice" claim was not among them.* *See* Resp. App. 4a. Nor was the issue "fairly included" in the "Issues Presented." Accordingly, that issue was not properly

presented to the highest court of California. *See Beck v. Washington*, 369 U.S. 541, 553 (1962).[1]

Moreover, California appellate rules also require that all briefs "[s]tate each point under a separate heading or subheading summarizing the point." CAL. R. CT. 8.204(a)(1)(B).[2] This rule applies to Petitions for Review. *Id.* RULE 8.504(a). Ford did not meet this requirement either. Neither the Table of Contents nor the section headings in the Petition for Review refer to the issue of vagueness or fair notice. Resp. App. 2a-3a. For this reason as well, Ford did not properly present this issue to California's highest court in its first Petition for Review.

Although these deficiencies were known to Ford (Plaintiffs drew them to the Court's attention in opposition to Ford's earlier certiorari petition (Brief in Opposition 5-6, *Ford Motor Co. v. Buell-Wilson*, No. 06-1068 (U.S. Apr. 3, 2007))), Ford's Petition does not mention them. Instead, it cites one

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[1]Of course, the California Supreme Court has the *power* to decide issues that were neither raised in the Petition for Review nor "fairly included" therein. CAL. R. CT. 8.516(b)(2). But that proves nothing. This Court's rules similarly provide that only questions presented by a petition for writ of certiorari or "fairly included therein[] will be considered by the Court." S. CT. R. 14.1(a). Nevertheless, the Court sometimes decides issues that are not presented or fairly included in the petition. *See, e.g.*, *Redrup v. New York*, 386 U.S. 767, 769-71 (1967); *Boynton v. Virginia*, 364 U.S. 454, 457 (1960). This occasional practice has never prevented the Court from enforcing Rule 14.1(a) in the vast majority of cases. Similarly, the California Supreme Court's power to consider issues that are not presented in a Petition for Review does not prevent that Court or this Court from enforcing the rule requiring parties seeking discretionary review to identify the issues as to which review is sought.

[2]Cases applying this rule are legion. *See, e.g.*, *Sierra Club v. City of Orange*, 163 Cal. App. 4th 523, 542 (2008); *Roe v. McDonald's Corp.*, 129 Cal. App. 4th 1107, 1114 (2005); *City of Lincoln v. Barringer*, 102 Cal. App. 4th 1211, 1228 (2002); *Heavenly Valley v. El Dorado County Bd. of Equalization*, 84 Cal. App. 4th 1323, 1345 n.17 (2000); *Golden Day Sch., Inc. v. Dep't of Educ.*, 69 Cal. App. 4th 681, 695 n.9 (1999).

oblique statement in the Introduction to the Petition for Review, as well as a footnote. Pet. 5. However, in light of the well-settled California rules requiring that issues raised in a Petition for Review be identified both in the "Issues Presented" and in the argument headings contained in the body of the Petition, the few sentences cited by Ford were insufficient to raise the vagueness/fair notice issue presented in the current Petition.[3]

Moreover, what Ford said in the Introduction to the Petition was insufficient to raise vagueness as an issue of federal due process. In that Introduction, Ford addressed the three issues that it had identified in the Issues Presented portion of the Petition. *See* Resp. App. 4a. Its discussion of the second of these issues contended that—as a matter of *California statutory law*—punitive damages could not be awarded because (in Ford's view) the Court of Appeal's opinion authorized juries "to deem a manufacturer's design

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[3]In the reply brief filed in support of its prior petition, Ford also relied on the statement in its Petition for Review that the California Court of Appeal's decision imposes

> a vague regime that will permit tens of millions of dollars of punishments to be imposed if a jury deems a manufacturer's conduct "despicable" on the strength of nothing more than a finding that, as will almost always be the case, the product might possibly have been made "safer" if more money had been spent in making it. That is neither constitutional nor rational. Review is necessary to conform California's product liability and punitive damage law to reason, common sense, and the United States Constitution. (Resp. App. 5a (*quoted at* Reply Brief for Petitioner 2))

Ford's decision not to rely on this passage in its present petition is understandable. "A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988); *cf. Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988).

decisions malicious, and impose severe punishment, even where undisputed objective indicators . . . affirmatively refute malice as a matter of law." *Id.* at 7a. Ford then asserted that

> [t]his ruling contradicts California law, decisions from other jurisdictions, and due process. This issue is especially important because punitive damages "pose an acute danger of arbitrary deprivation of property." (*State Farm Mut. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417-18 . . .) (*Id.* at 7a)

This unexplained, fleeting reference to due process and the quote from *Campbell* in the middle of a state law argument was insufficient to raise the vagueness/fair notice issue that Ford now presents. The reference to due process did not invoke the federal constitution; nor did it mention the void-for-vagueness doctrine in any of the customary ways—*i.e.*, by using the terms "void for vagueness," "unconstitutionally vague," "unconstitutionally uncertain" or "lack of fair notice." Nor did this passage attempt to explain what was vague or uncertain about California's punitive damages regime, let alone contend that California's punitive damages statute was unconstitutionally vague either on its face or as applied (a proposition that, as shown below, would have taken a great deal of explaining). That claim is therefore barred. *See Clark v. Arizona*, 548 U.S. 735, 762-65 (2006).[4]

These oblique statements in the Petition for Review contrast sharply with the vagueness argument Ford had presented earlier in the litigation. As the Petition correctly represents, Ford raised the vagueness issue at trial (Pet. 5) and

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[4]The cite to *Campbell* did not put the California Supreme Court on notice that a federal claim of vagueness was being asserted. "The discussion of 'a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim.'" *Adams v. Robertson*, 520 U.S. 83, 88 (1997) (citation omitted).

with crystal clarity (and at considerable length) presented it to the Court of Appeal. Pet. 6.[5] Surely if Ford *had* intended to raise the issue again in the California Supreme Court, its lawyers would have done so just as plainly. And if they had, Plaintiffs' Answer to the Petition for Review would have responded accordingly—or risked a withering comment in Ford's reply. In fact, however, Plaintiffs took note of Ford's failure to assert vagueness as an issue for review, and therefore did not address vagueness/fair notice in their Answer to the Petition for Review. *See* Answer to Petition for Review, *Buell-Wilson v. Ford Motor Co.*, No. S146150 (Cal. S. Ct. Sept. 18, 2006). Moreover, Ford's reply neither mentioned the omission nor made any mention of the vagueness issue itself. *See* Reply to Answer to Petition for Review (Oct. 2, 2006). Given these omissions, the California Supreme Court had no reason to believe that Ford sought review on a federal issue of vagueness or fair notice. *See Adams v. Robertson*, 520 U.S. 83, 89 (1997) (constitutional issue waived where, *inter alia*, petitioner failed to discuss issue in state supreme court reply brief even though it had been raised by respondent).

Nor is the footnote cited by Ford (which was buried at the end of the Petition for Review) sufficient to raise the vagueness/fair notice issue. Numerous California decisions apply the "heading rule" discussed above, and hold that presentation of an issue in a footnote is insufficient under California law to bring an issue to an appellate court's attention. *See, e.g., Evans v. Centerstone Dev. Co.*, 134 Cal. App. 4th 151, 160 (2005) ("We do not have to consider issues discussed only in a footnote") (citation omitted); *Roberts v. Lomanto*, 112 Cal. App. 4th 1553, 1562 (2003) (same);

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[5]Ford's first Appellants' Opening Brief devoted more than six pages to an as-applied vagueness argument. *See* App. Opening Brf. 56-63, *Buell-Wilson v. Ford Motor Co.*, No. D045154 (Cal. Ct. App. July 8, 2005).

Unilogic, Inc. v. Burroughs Corp., 10 Cal. App. 4th 612, 624 n.2 (1992) (same).

For all these reasons, the only issue Ford presents in its petition was not presented to the California Supreme Court "at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981). Because Ford failed to preserve it in its first Petition for Review, the vagueness issue was forfeited.

Nothing Ford did thereafter could resuscitate this issue. After the California Supreme Court denied review, Ford filed a petition for certiorari that attempted to raise the issue of vagueness. Petition for Writ of Certiorari 9-22, *Ford Motor Co. v. Buell-Wilson*, No. 06-1068 (U.S. Jan. 30, 2007). Plaintiffs filed a brief in opposition pointing out that the issue had not been preserved. Brf. in Opp. 4-6 (Apr. 3, 2007). The Court subsequently granted the petition, vacated and remanded for reconsideration in light of *Williams I*. 550 U.S. 931 (2007). On remand, the Court of Appeal held that the "third party harm"/failure-to-instruct issue that was the subject of this Court's GVR order had been forfeited by Ford because (1) it did not propose a legally correct third party harm instruction at trial; (2) did not raise the failure-to-instruct issue in its appeal to the Court of Appeal; and (3) did not raise that issue in its Petition for Review to the Supreme Court. Pet. App. 74a, 77a-98a.

In Ford's briefing on remand, Ford attempted to revive the vagueness issue. The Court of Appeal held that Ford could not do so in light of the limited scope of this Court's remand order:

> [W]e conclude *Philip Morris* does not require that we change any of the holdings in our original opinion, and thus, with some changes, "we reiterate [our original opinion] in its entirety."
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> * * * *
>
> We . . . decline Ford's (and amici curiaes') request that we reconsider our original holdings on the . . .

> issues related to the punitive damages award other than whether that award improperly punished Ford for harm to third parties. The United States Supreme Court's direction to this court was to reconsider our original decision "in light of *Philip Morris*." The only issue decided by *Philip Morris* was whether and when third party harm could be considered in imposing punitive damages. Based on our analysis of *Philip Morris*, our review of *Buell-Wilson I*, and the proceedings in the trial court, we conclude that nothing in *Philip Morris* requires us to reconsider the remainder of our original decision. (Pet. App. 3a, 52a (citations omitted))

The Court of Appeal thereupon republished without substantive change its prior opinion on a number of issues, including the issue of vagueness/fair notice. Pet. App. 61a-62a.

Because the vagueness issue had been forfeited, Ford's attempt to reinstate the issue by presenting it in its second Petition for Review came too late. The issue is therefore procedurally barred. *See Union Mut. Life Ins. Co. v. Kirchoff*, 169 U.S. 103 (1898).

II.

FORD'S "VAGUENESS/FAIR NOTICE" CHALLENGE DOES NOT MERIT CERTIORARI.

Even if it had not been waived by Ford's failure to raise the issue in its first Petition for Review in the California Supreme Court, Ford's "vagueness/fair notice" claim would not warrant certiorari. As shown in Section II(C), *infra*, the decision below does not conflict with any decision of this Court. Nor does it conflict with decisions of other courts. Section II(D), *infra*.

Nor does Ford present a substantial federal claim. It asserts that it lacked sufficient notice that it could be liable for punitive damages in circumstances such as those presented in this case.[6] But Ford was on notice, long before it designed the Explorer, that knowingly designing and selling a vehicle that exposes consumers to risk of severe injury or death, when the defect could be corrected at minimal cost, could result in punitive damages liability. Indeed, nearly thirty years ago a California court delivered this precise message to Ford in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981), where the court stated that "it should have been clear [to Ford] that a manufacturer of a dangerous, defective product might be liable for punitive damages if it knowingly exposed others to the hazard." *Id.* at 811.

That is precisely what Ford did in this case. The Court of Appeal affirmed, as supported by substantial evidence, the jury's determination that Ford *knowingly* produced an automobile that (1) would roll over in normal driving conditions and on dry pavement if a driver swerved to avoid an obstacle; (2) had a roof so weak that it would collapse during a rollover; and (3) could easily have been made more stable and given a stronger roof through well-known, available and cost-effective design changes. Pet. App. 11a-16a, 52a-53a. Yet to avoid a few months' delay of the vehicle's release date and to increase its profits, Ford declined to make feasible and affordable design corrections urged by its own engineers. *Id.* at 12a-15a. Ford's Petition does not challenge these conclusions, nor

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[6]Ford's argument, if accepted, would eviscerate state punitive damages statutes, with no readily available means of legislative repair. Punitive damages statutes are usually phrased as laws of general applicability, limiting the availability of punitive damages to cases of extreme reprehensibility. *See* p.13, *infra* (quoting the definitions of "malice" and "oppression" in California's punitive damages statute). What more could a legislature do to delineate the circumstances in which tortious conduct could justify an award of punitive damages?

could it. Indeed, Ford's own lawyer admitted to the jury that Ford "knowingly put a defective product out on the market and caused the family tragedy that you see before you now." RT8512-13.

For the reasons that follow, Ford was given ample notice that such conduct could give rise to liability under California's punitive damages law.

A. California Law Gave Ford Ample Notice Of The Circumstances Under Which Punitive Damages Could Be Awarded.

California law carefully defines the circumstances in which punitive damages can be awarded. Section 3294(a) of the California Civil Code (Pet. App. 224a) requires "clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." It defines "malice" as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." CAL. CIV. CODE §3294(c)(1). It defines "oppression" as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." *Id.* §3294(c)(2). In accordance with the statute and California precedent (*see, e.g., Coll. Hosp., Inc. v. Superior Court*, 8 Cal. 4th 704, 721 (1994)), the jury was instructed that the *sine qua non* for either malice or oppression—"despicable conduct"—is "conduct that is so mean, vile, base or contemptible that it would be looked down on and despised by reasonable people." RT8281. These restrictive standards were the result of legislation adopted in 1987 for the purpose of limiting the availability of punitive damages; they "represent[ed] a new substantive limitation on punitive damage awards." *Coll. Hosp., Inc.*, 8 Cal. 4th at 725.

Ford made the design decisions affecting Petitioner's Explorer between 1989 and 1997. Pet. App. 12a-16a. By that time, Ford had received more than ample notice, directly from

the California courts, that knowingly designing and selling a defective product that could kill or cause severe bodily injury—especially where the defect could have been corrected for a minimal cost—could give rise to liability for punitive damages. In *Grimshaw*, Ford had designed a product (the Pinto) that it knew would expose consumers to risk of serious injury or death, a defect that it could have corrected at minimal cost. 119 Cal. App. 3d at 813. Ford argued that "its due process rights were violated because it did not have 'fair warning' that its conduct would render it liable for punitive damages." *Id.* at 811. *Grimshaw* rejected this contention, relying on cases dating back to 1941 holding that punitive damages were recoverable "where the defendant's conduct constitutes a conscious disregard of the probability of injury to others." *Id.* In particular, the court stated that since the decision in *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689 (1967), "it should have been clear [to Ford] that a manufacturer of a dangerous, defective product might be liable for punitive damages if it knowingly exposed others to the hazard." *Id.*[7]

Grimshaw is not the only California case that has held Ford liable for knowingly designing and selling dangerous automobiles in conscious disregard of the safety of consumers. *See Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402-03 (1982) (substantial evidence supported award of punitive damages where Ford knew about failing brakes on a vehicle

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[7]In *Grimshaw*, the court said that Ford "knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20- to 30-mile-per-hour collision" and that "Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings" for financial reasons. 119 Cal. App. 3d at 813. "Ford's institutional mentality was shown to be one of callous indifference to public safety." *Id.* History does indeed repeat itself, as the cases discussed in the text following and the findings of the Court of Appeal in this case make all too clear.

but deliberately failed either to warn consumers or adopt remedial measures); *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738, 755 (2003) (Ford held subject to punitive damages after designing a flawed roof that crushed people during rollovers and declining to strength-test the roof; Ford's conduct was "highly reprehensible" in that its "nonaccidental, malicious conduct" of knowingly placing a flawed product with consumers showed "reckless disregard of consumers' safety and lives").

Nor could Ford reasonably have believed that compliance with federal government safety regulations would preclude punitive damages. 49 U.S.C. §30103(e) provides that "[c]ompliance with a motor vehicle safety standard . . . does not exempt a person from liability at common law." Moreover, *Grimshaw* had already held that punitive damages were necessary to deter wrongful conduct because "[g]overnmental safety standards . . . have failed to provide adequate consumer protection against the manufacture and distribution of defective products." 119 Cal. App. 3d at 810. There was no ambiguity in California law on this point.[8]

Accordingly, Ford had every reason to know long before it designed and marketed the Explorer that designing an automobile with known dangerous defects posing a serious threat to human life and health—such as the deadly combination of a propensity to roll *and* a weak roof structure—and rejecting low-cost, safer alternatives could lead to punitive damages.

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[8]Similarly, as the Court of Appeal noted, no prior California case had held that "expert disputes concerning design provide a defense to punitive damage liability." Pet App. 55a. There was no ambiguity in California law on this point either.

B. Ford Does Not Make (And Has Not Preserved) A Substantive Due Process Argument, And *Amici* Therefore May Not Do So.

It is important to distinguish Ford's vagueness theory from a contention—which certain *amici* attempt to advance—that the imposition of punitive damages in this case violates substantive Due Process because Ford assertedly complied with applicable laws and regulations and at least some paid experts defended the Explorer's design. Brf. of DRI at 10-22; Brf. of Product Liability Advisory Council, Inc. at 2-13; Brf. of Alliance of Automobile Mfgs. at 12-21; Brf. of Chamber of Commerce at 2-11. That substantive Due Process argument improperly goes beyond the vagueness/fair notice argument that Ford *does* make. *Amici* cannot expand the issue(s) raised by Ford's Petition. *See United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

Moreover, a substantive Due Process claim could not properly have been asserted by Ford (and, *a fortiori*, cannot properly be raised by *amici*) because that Due Process argument was never made by Ford in the state court briefing. Ford *did* argue below that, *as a matter of California law*, regulatory compliance and/or the existence of a dispute among experts precluded the imposition of punitive damages. The Court of Appeal understood this as a state law issue, and rejected Ford's (and *amici's*) arguments. Pet. App. 52a-61a. Ford then re-raised those arguments in its Petition for Review, but again did so only as contentions of California law.[9] *See* Petition for Review 25-32, *Buell-Wilson v. Ford Motor Co.*, No. S146150 (Cal. S. Ct. Aug. 28, 2006).

In any event, even if—*arguendo*—a plausible argument could be made that the Constitution prohibits punitive damages where the defendant's conduct complied with federal

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[9]Neither Ford nor any of the *amici* even attempt to show that any such substantive Due Process contention was presented to the California courts.

regulations, or where reasonable experts might disagree, that would be a problem of overbreadth, not vagueness, which would be corrected by an appropriate instruction, if requested. Such an instruction would inform the jury that if it found that the defendant had complied with all applicable regulations, or if it found that reasonable experts might disagree as to the lawfulness of the defendant's conduct, no punitive damages could be imposed. *See Williams I*, 549 U.S. at 355.[10] Ford failed to propose an instruction on the first of these points. It did propose an instruction on the second point (AA346), which the trial court rejected as erroneous.[11] Yet, as the Court of Appeal held, *Ford's appeal did not raise any failure-to-instruct issue* (and neither did its original Petition for Review). As a result, Ford has forfeited the right to raise such an issue now. Pet. App. 95a-96a.[12]

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[10]*Amici* presume that the facts supporting their contentions of expert disagreement and regulatory compliance are undisputed and established, and therefore assume that the Court could reverse the judgment if it accepted their substantive Due Process argument. That assumption is incorrect. To begin with, there is no federal regulatory standard for vehicle stability. Pet. App. 60a. As for the roof strength defect, there is a federal regulation, but there was a factual dispute as to whether this vehicle did comply with applicable regulations. *See* RT2136:24-2137:8, 2141:26-2142:13; AA2621 (evidence that Ford cheated on the FMVSS 216 roof crush test); RT1986:3-23, 2131:4-2132:10 (evidence that many Explorers on the road are not strong enough to pass test). The Court must assume that the jury resolved that dispute against Ford. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996).

[11]Ford's description of its "reasonable people could disagree" instruction is misleading. The passage quoted in the Petition (at 4-5) was in the second sentence of a longer instruction. AA346. But the trial court rejected as erroneous the *first* sentence of the instruction, which Ford has not quoted. RT8134:13-26.

[12]Any such argument would have been meritless. The jury was correctly instructed that it could not award punitive damages unless it found that Ford's conduct was objectively "despicable." *See* p.13, *supra*.

(continued . . .)

C. Ford's "Vagueness/Fair Notice" Claim Has No Support In This Court's Cases.

Ford cites to many of the Court's vagueness opinions involving dissimilar statutes applied in dissimilar contexts. Pet. 21-24. But the "rules against vagueness are not 'mechanically applied,' but depend in their application, on 'the nature of the enactment.'" *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 316 (1994) (citation omitted). That principle matters here, because all the factors which this Court has listed in describing the cases in which vagueness scrutiny is most relaxed are present in this case: this case involves "economic regulation," "civil rather than criminal penalties," and an applicable "scienter requirement." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

Consequently, the most relevant vagueness cases are those which, inexplicably, Ford ignores: the Court's recent decisions *rejecting* similar vagueness challenges to punitive damages laws far less specific than California's. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 465-66 (1993) (plurality opinion) ("the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-20, 24 n.12 (1991)[13]; *Smith v. Wade*,

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(. . . continued)

In deciding whether Ford's conduct met this standard, the jury could consider Ford's evidence of regulatory compliance and expert debate. Ford was therefore free to—and did—present such evidence, and to use that evidence in argument to urge the jury not to award punitive damages. *See* p.21, *infra*.

[13]Justice O'Connor dissented in *Haslip*, arguing that Alabama's punitive damages law—which was implemented by an instruction telling the jury that "[i]mposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels

(continued . . .)

461 U.S. 30, 49, 51 (1983) (rejecting vagueness challenge to punitive damages award against prison guard on the ground that actual intent was not required and that punitive damages could be awarded for reckless or callous indifference: "[W]e are not persuaded that a recklessness standard is too vague to be fair or useful"; recklessness "was sufficient to trigger a jury's consideration of the appropriateness of punitive damages"). While ignoring these three cases that reject a vagueness challenge, Ford cites no case holding a punitive damages statute unconstitutionally vague, either on its face or as applied.

Nor do this Court's cases establish any general rule that "if reasonable people can disagree about whether particular conduct is prohibited by a statute, the fair notice required by due process is absent." Pet. 21. For example, *Colautti v. Franklin*, 439 U.S. 379 (1979), holds that a state statute regulating permissible methods of abortion was impermissibly vague where, *inter alia*, it did not contain a *mens rea* or *scienter* requirement, and therefore could be used to punish doctors who made good faith medical decisions regarding the medically appropriate abortion procedure in a particular case. *See id.* at 401; *see also Village of Hoffman Estates*, 455 U.S. at 499 ("the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed").

These cases are of no help to Ford because, under California law, "an award of punitive damages first requires a finding of scienter—malice, fraud, or oppression." *Roman Catholic Bishop v. Superior Court*, 128 Cal. App. 4th 1155, 1171 (2005). And as already shown, it was also necessary for

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(. . . continued)

that you should do so" (*see* 499 U.S. at 6 n.1)—was void for vagueness. *Id.* at 42-53. No other member of the Court joined that dissent.

Plaintiffs to prove that Ford's conduct was "despicable" in the sense that it was "so mean, vile, base or contemptible that it would be looked down on and despised by reasonable people." *See* p.13, *supra*.[14]

In the absence of punitive damages cases directly on point, or even cases in other contexts that would support its vagueness theory, Ford is forced to rely heavily on a case that does not address the constitutional issue of vagueness at all, and admittedly involves "an issue of statutory interpretation and not a due process challenge." Pet. 23. *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), concerns the interpretation of a federal statute authorizing punitive damages for "willful" violations. *See id.* at 52. The Court held that "willful" misconduct includes "reckless disregard" of statutory duties and that if a defendant's interpretation of the statute is "not objectively unreasonable," its reliance on that interpretation is not "reckless" within the statute's meaning. *Id.* at 69.

The Court's interpretation of this federal statute says nothing about whether California's punitive damages statute was unconstitutionally vague as applied in this case. To begin with, the Court has already held that recklessness is not an unconstitutionally vague standard for imposing punitive damages liability. *Smith*, 461 U.S. at 49-51. Moreover, *Safeco*'s

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[14]The remaining cases Ford cites are no more relevant. *Connally v. General Construction Co.*, 269 U.S. 385 (1926), does not hold that a statute is unconstitutionally vague if its interpretation depends on the "probably varying impressions of jurors" (Pet. 21-22 (citing 269 U.S. at 395)), but only that a statute is unconstitutionally vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning." *Id.* at 391. *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915), holds only that a statutory penalty could not be imposed against a company where "[t]here was no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct" (*id.* at 490)—*i.e.*, conduct poles apart from Ford's actions in this case.

analysis is inapposite. In that case, the question of whether the defendants' misinterpretation of an admittedly ambiguous statutory term was reckless, as the statute required, was a pure issue of law to be decided by the courts. In contrast, whether Ford knew that the Explorer posed a high risk of causing physical harm was a question of fact to be decided by a jury. As noted, Ford was free to—and did—argue to the jury that it was not guilty of oppression, fraud, or malice and to support this claim by presenting evidence of regulatory compliance and any good-faith expert debate. *See, e.g.*, AA528-35; AA2618-56; RT1723-36; RT5145, 5179 (regulatory compliance); RT5152-54, 5164-67; AA716-19, 756 (expert disagreement).[15] It was also free to use that evidence to argue that no punitive damages should be awarded. But as long as a reasonable jury could reject this evidence, and find that Ford's conduct met California's well-established criteria for awarding punitive damages, nothing in *Safeco* prevented the jury from resolving this factual issue adversely to it.

The "qualified immunity" cases cited by Ford (*see* Pet. 23-24) are also irrelevant. Those cases have nothing to do with vagueness. Instead, they turn on a substantive rule that public officials are only liable for unconstitutional actions when their conduct violated "clearly established" legal principles. Ford makes no claim in its Petition that, as a matter of substantive constitutional law, punitive damages can only be awarded when the defendant's conduct violated "clearly established" legal principles. Its contention is only that California law was unconstitutionally vague, at least as applied to the

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[15]The statement of some *amici* (*e.g.*, Brf. of DRI at 4 (emphasis in original)) that under the decision below, "compliance with federal, state, and industry standards is *irrelevant* to the imposition of punitive damages," is false. If it had been irrelevant, evidence on those issues would have been excluded. In fact, the decision holds only that such compliance is not an absolute bar to punitive damages. Pet. App. 56a-61a.

facts of this case. The qualified immunity cases have nothing relevant to say on that issue.

D. There Is No Conflict In The Cases.

Ford purports to find conflicts everywhere—between the decision in this case and decisions of this Court; decisions of other state and federal courts that have addressed "vagueness as-applied" challenges to punitive damages awards; and the general methodology used by the courts in evaluating such claims. None of the claimed conflicts is real.

1. There is no conflict with respect to the only issue presented by the Petition. As noted above, no case strikes down a punitive damages statute as unconstitutionally vague (either on its face or as applied) merely because *some* but not *all* reasonable people (or, as in this case, paid experts testifying after-the-fact) would find the defendant's conduct lawful or because the defendant's product complied with applicable regulatory standards.

2. Ford nevertheless argues that certiorari is warranted because of a supposed conflict in the lower courts because some decisions purportedly refuse to consider as-applied challenges to punitive damages awards once a facial challenge to the statute has been rejected. Pet. 10-19. Ford is wrong. No state or federal case has ever held that as-applied vagueness challenges are barred if a statute is not facially invalid.

This includes the decision below. Ford claims that the Court of Appeal "effectively refused to entertain Ford's as-applied vagueness challenge because a 1981 decision had found California's punitive damages statute to be facially valid." Pet. 3. This is incorrect. In the first place, that 1981 case included an "as-applied" challenge, which the Court of Appeal rejected. *See Grimshaw*, 119 Cal. App. 3d at 811. Moreover, the opinion in the present case did not refuse to entertain an as-applied challenge or ignore the particular facts

of this case. Ford's claims to the contrary rest on both a mischaracterization of what the Court of Appeal said and a truncated quotation from its opinion. In fact, in the third paragraph of the opinion quoted in the footnote below, which Ford omits from its Petition (*see* Pet. 6), the Court of Appeal rejected Ford's as-applied claim on the merits.[16] Ford's assertion that the California Court of Appeal "rejected Ford's vagueness challenge simply because other courts had rejected vagueness challenges in other cases involving different facts" (Pet. 18) is false.

Ford's contention that the California courts refuse to entertain as-applied vagueness challenges to punitive damages awards (*see* Pet. 11-12) is also false. The only vagueness challenge in *Bertero v. National General Corp.*, 13 Cal. 3d 43 (1974), was a facial one: the defendant contended that the California punitive damages statute was unconstitutionally vague "because it fails to provide sufficient guidance for the

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[16]Here is what the Court of Appeal said in rejecting Ford's vagueness claim:

> Ford contends that if punitive damages can be awarded on this record, Civil Code section 3294 is unconstitutionally vague because it failed to give Ford fair notice that its conduct could subject it to punitive damages. This contention is also unavailing.
>
> Ford made this same argument over 25 years ago in *Grimshaw, supra*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348. The Court of Appeal rejected it, concluding that "punitive damages are recoverable in a nondeliberate or unintentional tort where the defendant's conduct constitutes a conscious disregard of the probability of injury to others." (*Id.* at p.811, 174 Cal.Rptr. 348.)
>
> *Additionally, Ford bases this contention on the fact that, at most, reasonable people could disagree with the decisions it made. However, we have already discussed and rejected this argument, ante.* (Pet. App. 61a-62a (emphasis added))

trial courts charged with implementing it." *Id.* at 66 n.13. Similarly, while constitutional challenges to California's punitive damages statute were dismissed out of hand in *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402 n.2 (1982), nothing in the decision indicates that the constitutional challenges were based on vagueness, much less as-applied vagueness. Finally, *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal. 3d 809, 819 (1979), did not reject constitutional challenges at all; the court merely noted that the proposition that California's punitive damages statute was unconstitutional had been "frequently rejected" in other cases. In fact, *no* California decision "effectively preclude[s] California courts from considering as-applied vagueness challenges to California's punitive damages statute" (Pet. 12)—as the decision below irrefutably demonstrates. *See* pp.22-23, *supra*.[17]

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[17]The same is true for the non-California cases that Ford contends have followed the same approach that Ford mistakenly ascribes to California. Pet. 12. The only vagueness argument advanced in *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984), was that Colorado's punitive damages statutes suffered from "facial vagueness." *Id.* at 214. The court therefore had no reason to address whether the statute was unconstitutionally vague as applied. Nor was an as-applied vagueness challenge made in *Sturm, Ruger & Co. v. Day*, 594 P.2d 38 (Alaska 1979), *overruled on other grounds*, *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985). Instead, defendant again raised only a challenge based on facial vagueness, contending that Alaska's punitive damages statute gave "the jury . . . no standards by which to determine the extent of a defendant's culpability and the amount of damages to be assessed." *Id.* at 46. Likewise, in *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747 (N.D. 1989), the defendant claimed only that North Dakota's punitive damages statute was "void for vagueness" because "the 'vagueness' of the proscribed conduct, coupled with the 'lack of objective guidelines by which to set the amount of punishment,' results in 'arbitrary punishment'" in violation of [the Due Process Clause]." *Id.* at 755. Accordingly, none of these decisions involves a refusal by the state courts to address an "as applied" vagueness challenge to application of a state punitive damages statute.

Ford's constitutional "vagueness/fair notice" claim is premised on

(continued . . .)

For these reasons, neither the decision below nor the other state court cases Ford cites conflict with the cases Ford identifies as having followed the correct approach to resolving as-applied vagueness challenges. Pet. 15-17. No jurisdiction—and certainly not California—has "forever insulated" punitive damages awards from "as-applied vagueness challenges regardless of the conduct at issue." Pet. 16. To the contrary, the California courts, like the courts in other states, remain open for consideration of such claims.

3. Ford also contends that certiorari should be granted to "clarify the legal standard that courts should apply when deciding as-applied challenges to punitive damages statutes." Pet. 19. It argues that such clarification is necessary because of a supposed conflict in decisions that adjudicate as-applied vagueness challenges. Ford says that some courts permit punitive damages if "reasonable persons could conclude the conduct at issue was unlawful . . . even if reasonable persons could also conclude the conduct was lawful." *Id.* In contrast, other courts supposedly "hold that as-applied vagueness challenges fail only where reasonable persons could *not* conclude the conduct was lawful." *Id.* (emphasis in original).

This supposed conflict is a fiction. *None* of the cases Ford cites to support this supposed conflict involves claims for punitive damages.[18] Moreover, *none* of these cases

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(. . . continued)

the assertion that at least some persons would have found its conduct reasonable in light of federal automotive safety standards, "ongoing genuine debate in the engineering community," etc. Pet. 7. No similar claim of constitutional dimension was made in *any* of the other state court cases Ford cites in trying to show the existence of a widespread conflict. *None* of the defendants in *Palmer*, *Day* or *Stoner* attempted to show that their conduct was "objectively reasonable" so as to preclude the availability of punitive damages on an as-applied constitutional "vagueness/fair notice" theory.

[18] *Barber v. Jefferson County Racing Ass'n*, 960 So. 2d 599 (Ala.

(continued . . .)

discusses the objective reasonableness of *any* litigant's conduct, much less addresses whether punitive damages (or, indeed, any other civil or criminal penalties) are permissible even if some reasonable persons would conclude that the defendant's conduct was lawful. Accordingly, none of these cases supports Ford's Petition.

That leaves Ford with two Fifth Circuit cases, which similarly do not involve punitive damages. Both *S&H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Commission*, 659 F.2d 1273 (5th Cir. 1981), and *B&B Insulation, Inc. v. Occupational Safety & Health Review Commission*, 583 F.2d 1364 (5th Cir. 1978), interpreted an OSHA regulation that, *inter alia*, made employers responsible for "requiring the wearing of appropriate personal protective equipment in all occupations where there is an exposure to hazardous conditions." 29 C.F.R. §1926.28(a).

B&B Insulation held that this regulation could be enforced against an employer only as applied to "conditions which the cited employer's industry would recognize as hazards requiring the use of safety equipment." 583 F.2d at 1366.

(. . . continued)

2006), *cert. denied*, 551 U.S. 1131 (2007), holds that the state's criminal gaming law was not unconstitutionally vague as applied to the defendants' attempt to operate slot machine-like devices at their racetracks. *State v. Thirteenth Judicial District Court*, 208 P.3d 408 (Mont. 2009), similarly holds that a state statute making it a crime to leave the scene of an automobile accident involving death or injury was not unconstitutionally vague as applied. *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009), holds that a state's campaign disclosure law was unconstitutionally vague as applied to activities that resulted in no detriment to the putative donor and had no market value. And *Haggblom v. City of Dillingham*, 191 P.3d 991 (Alaska 2008), held that a city ordinance requiring the euthanasia of dogs that had bitten a person without provocation was not unconstitutionally vague where the conduct of plaintiff's dog fell within the "hard core" of the conduct prohibited by the ordinance. *Id.* at 997 n.21.

In so holding, the court first recognized that the regulation incorporated a tort law "reasonable man" standard, pursuant to which "evidence of customary conduct of those similarly situated may be probative in determining his behavior." *Id.* at 1370. However, the court then went on to demand "a closer identification between the projected behavior of the reasonable man and the customary practice of employers in the industry" than is found in tort law. *Id.* The court gave two reasons for its departure from tort concepts of reasonableness. First, unlike the tort system, "the purpose of the [Occupational Safety and Health Act] is preventive rather than compensatory." *Id.* at 1370-71. Moreover, the Congress that enacted the Act "thought specificity of standards desirable." *Id.* at 1371. Consequently, as the Fifth Circuit later stated in *S&H Riggers*, the *B&B Insulation* court "concluded . . . that rigid application of the tort law concept [of the reasonable person standard] would be inconsistent with the preventive goals of OSHA and Congress's expressed preference for specific rather than general standards." *S&H Riggers & Erectors*, 659 F.2d at 1277. *S&H Riggers* confirmed *B&B Insulation*, but added an additional ground for holding an employer liable for violating the OSHA regulation in question—where the employer has "actual knowledge that personal protective equipment is required for employee safety." 659 F.2d at 1281.[19]

These two Fifth Circuit cases are irrelevant here, for multiple reasons. First, these cases interpreted a new federal regulation that was so vague that "no two members of the [Occupational Safety and Health Review] Commission had ever reached agreement on the regulation's meaning." *S&H Riggers*, 659 F.2d at 1281. In contrast, this case concerns a long-standing state statute, whose operative terms are not only

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[19]Ford states that this exception does not apply if the employer "could reasonably conclude that additional . . . protection was not necessary." Pet. 21 (purporting to quote 659 F.2d at 1283). No such language appears in the opinion.

defined in the statute itself but have also been the subject of innumerable judicial decisions that have elaborated its meaning in situations very much like those presented here. *See* pp.14-15, *supra*. This makes all the difference; indeed, even *S&H Riggers* recognized that the "reasonable person standard" is "'one of the rudimentary precepts of our law'" and concluded that "[p]ossibly a reasonable person standard that does not accept industry practice as controlling can give employers adequate notice of the requirements of [the OSHA regulation]." 659 F.2d at 1280 (citation omitted). Moreover, the courts in *B&B Insulation* and *S&H Riggers* knowingly departed from common law standards of notice to further OSHA's "preventive purpose and the intended specificity of its standards" (583 F.2d at 1371), concerns that have no place in implementing common law rules. For these reasons, Ford cannot cite a single case—and there is none—that has relied on these Fifth Circuit decisions in addressing a constitutional due process/"fair notice" challenge to a punitive damages award.[20]

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[20]Even if the rules promulgated by the Fifth Circuit in the two OSHA cases could be shoehorned wholesale into the quite different domain of punitive damages Ford would not be helped. As noted above, *S&H Riggers* expressly permits the imposition of administrative penalties where the employer had "actual knowledge" that safety equipment was required. *See* 659 F.2d at 1283. That principle forecloses any "fair notice" claim here. As the Court of Appeal found, Ford knew that the Explorer was dangerously unstable and prone to rollover in normal driving conditions; knew that the roof structure was weak and prone to collapse in a rollover; and knew of technologically and economically feasible ways to stabilize the vehicle and strengthen its roof that it rejected for financial reasons. Pet. App. 52a-54a.

CONCLUSION

The Petition should be denied.

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APPENDIX

APPENDIX

IN THE
SUPREME COURT OF CALIFORNIA

BENETTA BUELL-WILSON et al.,

Plaintiffs and Respondents,

v.

FORD MOTOR COMPANY, et al.

Defendants and Appellants.

After A Decision By The Court of Appeal,
Fourth Appellate District, Division I, Case Nos. D045154, D045579

San Diego County Superior Court
The Honorable Kevin A. Enright
No. GIC800836

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ISSUES PRESENTED FOR REVIEW

1. In a product liability design case, is evidence of industry standards and custom, including the product's real-world safety performance relative to comparable products, relevant to the issues of design defect and punitive damages?

2. In a product liability design case, can malice within the meaning of Civil Code section 3294 be deemed established by clear and convincing evidence against a motor vehicle manufacturer where (a) the vehicle complies with applicable federal standards that are required by law to "meet the need for motor vehicle safety," (b) the federal government has rejected the precise standards used by plaintiffs' expert to condemn the product as defective, (c) the vehicle is as safe or safer than comparable vehicles, and (d) there is an objectively reasonable, genuine debate over whether the product is defective?

3. In evaluating punitive damages pursuant to the federal due process *de novo* review standard, may a court (a) apply the state-law substantial evidence test to presume that the jury made findings it did not expressly make and to disregard objective factors mitigating reprehensibility, and (b) punish the manufacturer's lawful conduct, including its sale of a product to third parties not before the court, even where the manufacturer prevailed in the previous eleven cases involving that same product?

WHY REVIEW SHOULD BE GRANTED

The decision below creates new and draconian rules for product liability cases, including a virtual liability-without-fault standard for punitive damages. Unless reviewed and overturned, that decision will render it irrelevant that a manufacturer's design decisions resulted in a product that complies with industry standards and custom, comports with relevant federal safety standards and reasonable policy judgments, and performs as well or better than comparable competing products. In place of these knowable standards, the decision substitutes a vague regime that will permit tens of millions of dollars of punishments to be imposed if a jury deems a manufacturer's conduct "despicable" on the strength of nothing more than a finding that, as will almost always be the case, the product might possibly have been made "safer" if more money had been spent in making it. That is neither constitutional nor rational. Review is necessary to conform California's product liability and punitive damage law to reason, common sense, and the United States Constitution.

Before this product design trial, eleven Ford Explorer cases involving similar claims had gone to judgment, and in *all eleven* cases judgment was entered in favor of Ford Motor Company (hereafter "Ford"). (Appellant's Appendix 1154-1237 (hereafter "AA").) But in this case, the jury returned split verdicts finding that the Explorer was defective, and that Ford had acted with "malice" in designing it. The jury awarded an astonishing $368 million in compensatory and punitive damages.

Although the Court of Appeal found that the jury was inflamed by "passion and prejudice" and not acting as a "fair and neutral trier of fact" (*Buell-Wilson v. Ford Motor Company* (August 17, 2006, D045154, D045579) slip opinion, p. 37 (hereafter "slip opn.")), and thus reduced the

compensatory and punitive damages to $82.6 million, it otherwise affirmed the judgment. In so doing, the court declared that the jury was empowered to regulate automotive safety – even to the point of overriding the federal agency expressly charged by Congress with this responsibility – "because '[g]overnmental safety standards . . . have failed to provide adequate consumer protection.'" (*Id.*, pp. 49-50.) At the same time, in deciding three important issues of law, the court jettisoned as irrelevant the most reliable and objective information for making decisions about product design and safety.

First, the court held as a matter of law that industry standards and custom – including comparative accident statistics showing that the product was as safe or safer than comparable products – are "irrelevant not only to the issue of defect, but also to punitive damages." (Slip opn., p. 24.) This holding departs from the reasoning of *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413 (hereafter *Barker*), extends a split among the California courts of appeal, and places California at odds with the majority of other jurisdictions, as well as the Restatement Third of Torts, Product Liability. The court's ruling that it is "reversible error" (slip opn., p. 23) to allow introduction of such data regarding how products comparatively perform in the real world will preclude both plaintiffs and defendants from providing juries with the most crucial information – precisely the kind that actual governmental regulators themselves would rely on – for making decisions about public safety. (See *Daly v. Gen. Motors Corp.* (1978) 20 Cal.3d 725, 746 ["Product designs do not evolve in a vacuum, but must reflect the realities of the market place, kitchen, highway, and shop"]; *Bammerlin v. Navistar Int'l Transp. Corp.* (7th Cir. 1994) 30 F.3d 898, 901 ["Jurors are not engineers, and data on accident rates speak more loudly than abstract arguments"].)

Second, the court held that juries are authorized to deem a manufacturer's design decisions malicious, and impose severe punishment, even where undisputed, objective indicators – such as ongoing genuine debate in the engineering community, accident data showing the product is among the safest in its class, and governmental regulatory decisions confirming the manufacturer's judgment – affirmatively refute malice as a matter of law. This ruling contradicts California law, decisions from other jurisdictions, and due process. This issue is especially important because punitive damages "pose an acute danger of arbitrary deprivation of property." (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417-18 (hereafter *State Farm*).) The danger is heightened in design defect cases, which require jurors to second-guess complex policy judgments, in hindsight, regarding whether a product's utility outweighs its risks, and always in the context of an accident resulting in tragic personal injuries likely to provoke the jury's passion.

Third, the court misinterpreted the due-process excessiveness standards governing punitive damages. These standards require "exacting" *de novo* judicial scrutiny (see *State Farm*, *supra*, pp. 417-18), but the court conflated *de novo* review with state-law substantial evidence analysis and, as a result, declined to consider key objective factors in upholding a record-setting $55 million punishment. Instead, the court relied on factors condemned by *State Farm*, such as Explorer sales to consumers not before the court, even though Ford had prevailed in the eleven prior Explorer cases.

For these reasons, this Court should grant review.

No. 09-297

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

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REPLY BRIEF FOR PETITIONER

Respondents' brief in opposition unwittingly highlights the confusion surrounding how courts should resolve as-applied vagueness challenges to punitive damage awards.

The relevant question is not, as Respondents would have it, whether Ford had notice that a California jury could impose punitive damages in a design defect case; rather, it is whether Ford had notice of how it could tailor its conduct to comply with the law and avoid punishment. As to that question, Respondents have no answer. The flaw in Respondents' argument is the same flaw manifest in the decision below, as well as in the decisions of the many other state courts that follow the same misguided approach: if a defendant can be punished for conduct that reasonable persons could conclude was lawful — as Ford was in this case — then the defendant lacks the fair notice that would enable it to conform its conduct to the law and avoid punishment.

This is a critical issue of procedural due process that affects businesses and individuals throughout the country, as evidenced by the *amicus* filings urging this Court to grant review. *See, e.g.*, Chamber Br. 2 (this case is of "enormous interest to the American business community"); PLAC Br. 2 ("California courts have embraced a regime of *post hoc* second guessing that would deprive any manufacturer of the ability to know in advance whether its decisions will subject it to punishment."). California and other States have effectively insulated their punitive damages statutes from as-applied vagueness challenges by incorrectly treating as-applied challenges as facial challenges and then denying them on that ground. The confusion in the lower courts has resulted in defendants being subjected to massive, multimillion-

dollar punishments — including the $55 million sanction in this case, the largest punitive damages award affirmed on appeal in California history — for conduct that reasonable people could conclude was lawful.

This Court should grant review and hold that an as-applied vagueness challenge to a punitive damages statute should be sustained if the defendant's conduct was objectively reasonable, and that the California courts' refusal to apply such a rule violated due process.

I. FORD PRESERVED ITS VAGUENESS CHALLENGE.

Respondents erroneously contend that Ford "forfeited" its vagueness challenge. Opp. 5-11. "Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state courts disappears." Eugene Gressman, et al., SUPREME COURT PRACTICE 197 (9th ed. 2007). Here, the California Court of Appeal, in the decision under review, squarely addressed and resolved Ford's due process vagueness challenge. *See* Pet. App. 61a ("Ford contends that if punitive damages can be awarded on this record, Civil Code section 3294 is unconstitutionally vague because it failed to give Ford fair notice that its conduct could subject it to punitive damages. This contention is also unavailing."). Respondents agree. *See* Opp. 23 ("the Court of Appeal rejected Ford's as-applied claim on the merits").

Ford then filed a petition for review in the California Supreme Court presenting the following issue: "As a matter of . . . federal due process, are punitive damages prohibited in product liability cases where

the manufacturer's design conformed to objective indicators of reasonable safety, including industry standards and custom, governmental safety standards and policy judgments, and the existence of a genuine debate about what the law requires?" Petition for Review 1; *id.* at 35–38. Although the California Supreme Court may limit grants of review to only a subset of the issues presented, *see* Cal. R. Ct. 8.516(a)(1), the court granted review as to Ford's *entire* petition, including the federal due process vagueness challenge, before dismissing the petition.

In short, no California court has ever held that Ford waived its vagueness challenge; the court of appeal squarely ruled on it, and the Supreme Court granted review on it. Where, as here, the state courts have decided the issue, "[t]here can be no question as to the proper presentation of a federal claim." *Raley v. Ohio*, 360 U.S. 423, 436–37 (1959).

Respondents' entire waiver argument rests on the claim that Ford's *prior* petition for review — *i.e.*, the one that Ford filed after the court of appeal's first decision in this case, and before this Court's GVR order — did not preserve the vagueness challenge. Respondents are mistaken: Ford specifically raised this issue in its first petition for review in a manner that more than adequately met California's liberal standards for presenting issues for review. *See Adams v. Murakami*, 54 Cal. 3d 105, 114 n.5 (1991). Ford raised the issue prominently in the introduction and elsewhere in its first petition for review, *see* Pet. for Review 1, 3, 11 n.2, Resp. App. 5a, 7a, and then presented it again in its first petition for certiorari, which was granted by this Court, over Respondents' objection that the issue had been waived. *See United States v. Williams*, 504 U.S. 36, 40 (1992) (in granting certiorari, the Court "necessarily considered and rejected" the respondent's waiver argument).

Even if Respondents were correct — which they are not — in claiming that Ford did not raise the vagueness issue in its first petition for review, it would not matter because the court of appeal squarely addressed and resolved it on remand. And California law clearly provides that when a case is remanded through a GVR order from this Court, "the cause in its entirety is properly before" the state courts on remand. *People v. Hamilton*, 45 Cal. 3d 351, 363 (1988).

II. THIS CASE PRESENTS A QUESTION OF GREAT IMPORTANCE THAT HAS DIVIDED THE LOWER COURTS.

1. Respondents' argument mirrors the mistaken approach the California courts have taken. Respondents contend that Ford had notice that punitive damages could be imposed for "knowingly designing and selling a vehicle that exposes consumers to risk of severe injury or death, when the defect could be corrected at minimal cost." Opp. 12.

Respondents fundamentally miss the point that the type of general notice on which they and the California courts rely is insufficient as a matter of due process because it provides no standard to which a defendant can conform its conduct and thereby avoid the risk of punishment. *All* motor vehicles — and indeed many other products — present a risk of injury or death, and whether a particular risk renders a product "defective" is often a judgment call over which reasonable people can and do disagree. *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 37-38 (1982) ("[t]he very notion of how much design safety is enough . . . involves a morass of conceptual, political, and practical issues on which juries, courts, commentators, and legislatures strongly disagree" and "[t]here is there-

fore a vast defect 'no man's land' where a manufacturer has no idea whether it is on the right or wrong side of the law").

Moreover, determining whether a product is "defective" requires more than assessing the cost of "correcting" the alleged "defect"; it also requires considering the effect on the product's utility or desirability to consumers, not to mention any new dangers that might be created through an alternative design. *See Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1075 (4th Cir. 1974) (design that does not maximize safety is not "defective" where there are utility benefits); AAM Br. 8 ("an automobile manufacturer could make every car it designs a tank, but few consumers could afford to purchase it").

Thus, the fact that a defendant has notice that punitive damages could be imposed for knowingly selling a product that a jury may later find "defective" is not the type of notice that permits a product seller to conform its conduct to the law and *avoid* being assessed punitive damages — and therefore fails to comport with due process. *See City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (the "purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law"); *United States v. Kozminski*, 487 U.S. 931, 949-50 (1988) ("statutes [that] provide almost no objective indication of the conduct or condition they prohibit . . . would fail to provide fair notice"); *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (opinion of Scalia, J.) (criminal statutes should be construed in defendant's favor given "the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed"). Rather, under the California approach, manufacturers can conform their conduct to avoid punishment only by refusing to sell any product that

poses any risk of injury that some jury might one day find renders the product defective, even if other juries, an entire industry, and the federal government could — and did — reasonably reach the opposite conclusion.

Respondents contend that the text of California Civil Code section 3294(a) provided fair notice because it "carefully defines the circumstances in which punitive damages can be awarded." Opp. 13. But this case concerns how the California courts have *interpreted and applied* this statutory language. As Ford has shown, they have done so in a way that permits punishment for objectively reasonable conduct, thus denying defendants fair notice of "the conduct that will subject [them] to punishment." *BMW v. Gore*, 517 U.S. 559, 574 (1996).

Nor does the fact that the statute contains a scienter requirement cure the vagueness problem because a defendant cannot know in advance what conduct, if done "knowingly," will subject it to punitive damages. *See Screws v. United States*, 325 U.S. 91 (1945). "'Willfully' doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done 'willfully.'" *Id.* at 154 (opinion of Roberts, J.).

2. Respondents insist that the California courts "remain open for consideration" of as-applied vagueness claims. Opp. 25. But the court of appeal rejected Ford's vagueness challenge by reasoning that the court in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981), considered the "same issue" — even though the facts of *Grimshaw* were completely different, and even though the *Grimshaw* court took the same misguided approach by relying on previous decisions rejecting vagueness challenges in cases in-

volving drunk driving, failure to properly set a railway switch, and intentionally failing to fix a fuel pump. *See id.* at 811.

Respondents argue that *Grimshaw* itself involved an as-applied challenge. Opp. 22. But if Respondents are correct — and they are not — then the *Grimshaw* court made the same error the court of appeal made here: it resolved an as-applied challenge by relying on old cases that rejected vagueness challenges based on entirely different facts. The California courts' formulaic denial of various as-applied challenges hardly demonstrates an openness to considering these challenges on the merits.

Respondents err in relying on the court of appeal's mention of its prior state-law sufficiency-of-the-evidence analysis. Opp. 23. In conducting that analysis, the court rejected Ford's argument that state law precluded imposing punitive damages for objectively reasonable conduct. Pet. App. 56a. Furthermore, the court gave no weight to conclusions reached by the federal government, and it treated as entirely irrelevant evidence that the product at issue was among the safest of its kind. Thus, the court in applying the *state-law* standard disregarded facts critical to the *constitutional* standard.

Respondents' hyperbolic contention that accepting Ford's argument would "eviscerate" state punitive damages statutes, Opp. 12 n.6, demonstrates their fundamental misunderstanding of the nature of Ford's as-applied challenge. Accepting Ford's argument would leave the statute intact and completely enforceable with respect to objectively unreasonable conduct that falls within its scope. *See Canyon Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021, 1028 (9th Cir. 2009). To solve the due process problem, all the California courts would have to do is interpret the California statute the same way this

Court interpreted the federal statutes at issue in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), and *Screws*, 325 U.S. 91.

Respondents err in claiming that Ford's *amici* are advancing a substantive due process argument. The *amici*'s point is *not* that compliance with federal standards is a bar to punitive damages, but rather that such compliance must be treated as *relevant*. *See* DRI Br. 14 ("[T]he objective standards imposed by [safety] agencies . . . should be deemed highly relevant, if not dispositive, for due process purposes."). Indeed, the fact that conduct complies with judgments made by federal regulators is powerful evidence that it is objectively reasonable. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009) (defendant's conclusion about the propriety of conduct was objectively reasonable where it was consistent with that of numerous judges expressed in "well-reasoned majority and dissenting opinions"); *Gore*, 517 U.S. at 570 (the "diversity" of state disclosure laws "demonstrates that reasonable people may disagree about the value of a full disclosure requirement"). Refusing to consider the existence of such judgments, by contrast, demonstrates a lack of interest in the constitutionally-significant issue of what notice has been provided to a defendant seeking to conform its conduct to the requirements of the law.

3. Respondents largely ignore the many vagueness decisions from this Court that conflict with the decision below, *see* Pet. 15, 21-24, and focus on three cases that are either irrelevant or support Ford's position. Opp. 18-19. In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 465 (1993), a plurality considered an entirely different argument than the one presented here: that a state procedure was unconstitutionally vague "because petitioner had no notice of the possibility that the award of punitive

damages might be divorced from an award of compensatory damages." Likewise, in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 24 n.12 (1991), the Court considered a challenge to the *amount* of a punitive damage award, and expressly noted that "[d]ecisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred." And in *Smith v. Wade*, 461 U.S. 30 (1983), the Court did *not* reject a vagueness challenge, but simply held that an award of punitive damages against public officials under 42 U.S.C. § 1983 could be based on recklessness without proof of actual malicious intent. In fact, the *Smith* Court rested its decision on the fact that the defendants in the case were entitled to qualified immunity before *any* liability could be imposed. *See* 461 U.S. at 55. Thus, the Court did not permit an award of punitive damages for objectively reasonable conduct.

Respondents dismiss this Court's qualified immunity cases as "irrelevant" to the vagueness inquiry, but in doing so they ignore the basis for *Smith*, and ignore *United States v. Lanier*, 520 U.S. 259, 270-71 (1997), where the Court equated its approach to qualified immunity with its approach to vagueness.

4. Ford's petition also showed that certiorari is warranted to resolve the circuit split over how as-applied vagueness challenges should be resolved. Pet. 19-26. Respondents urge the Court to ignore the cases Ford cites because they do not involve punitive damages and supposedly do not assess the objective reasonableness of the defendant's conduct. Opp. 25-26. But the fact that these are not punitive damages cases *supports* certiorari because these cases illustrate that the confusion in the lower courts over as-applied vagueness challenges is not limited to punitive damages cases, but impacts a broad variety of

challenges to civil and criminal laws and regulations. And Respondents are simply wrong in claiming that none of these cases involved assessing the objective reasonableness of the conduct at issue. *See Haggblom v. City of Dillingham*, 191 P.3d 991, 997 (Alaska 2008) ("[n]o reasonable person would conclude" that "provocation" occurred); *Canyon Ferry*, 556 F.3d at 1029-30. It is true that other courts have rejected as-applied vagueness challenges without considering the objective reasonableness of the defendant's conduct — but that is precisely Ford's point.

Respondents seek to explain away the conflict between the decision below and *B & B Insulation, Inc. v. OSHRC*, 583 F.2d 1364 (5th Cir. 1978), and *S & H Riggers & Erectors v. OSHRC*, 659 F.2d 1273 (5th Cir. 1981), on the basis that the Fifth Circuit cases involved a federal standard that was so vague that members of the Occupational Safety and Health Review Commission had disputed its meaning. But in the instant case, eleven Ford Explorer cases had gone to judgment before the Buell-Wilson trial, and in all eleven cases judgment was entered in Ford's favor. Just as the Commission members could not agree in the Fifth Circuit cases, the members of the first twelve juries here could not agree (indeed, the vast majority of them agreed with Ford).

* * *

Although this Court has repeatedly considered constitutional limitations on the *amount* of punitive damages that may be awarded in civil cases, it has generally not considered the antecedent question of what constitutional requirements attend the imposition of punitive damages in the first place. That is a question of procedural due process, and as this case demonstrates, state courts have been reluctant to afford defendants faced with the prospect of punitive

damages the basic protection of notice of the conduct for which they might be punished. *Ex ante*, Ford was simply without notice sufficient to conform its conduct to what the jury in this case would later decide was warranted. On the contrary, the objective factors it could have considered at the time of the conduct that would later be reviewed indicated that its conduct was *consistent* with reasonable conduct. This Court should grant certiorari to make clear that an award of punitive damages is not constitutional in the absence of reasonable notice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 09-297

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

BENETTA BUELL-WILSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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United States v. Booker,
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Welch v. Gen. Motors Corp.,
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Williams v. New York,
337 U.S. 241 (1949) 15

Other Authorities

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Retribution and Deterrence: The Role of Punitive Damages in Product Liability Litigation, 74 Ky. L.J. 1 (1985) 11

Stephen Breyer,
Breaking the Vicious Circle: Toward Effective Risk Regulation (1993) 8

Andrew C. Clausen & Annette M. Carwie,
Problems Applying the Life of Georgia v. Johnson *Case in the Liability Setting: Where Do We Go With Punitive Damages After* BMW v. Gore*?*, 58 Ala. Law. 46 (1997) 8

Steven Garber,
Product Liability, Punitive Damages, Business Decisions and Economic Outcomes, 1998 Wis. L. Rev. 237 11

W. Page Keeton, *Prosser & Keeton on the Law of Torts* (5th ed. 1984) 18

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A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998) 12

Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347 (2003) 7

Aaron D. Twerski, *Punitive Damages: Through the Five Prisms*, 39 Vill. L. Rev. 353, 356 (1994) 8

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BRIEF FOR THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Amicus curiae respectfully submits this brief in support of the petition for a writ of certiorari.[1]

INTEREST OF *AMICUS CURIAE*

The Alliance of Automobile Manufacturers, Inc. ("the Alliance") is a nonprofit trade association formed in 1999 and incorporated in Delaware. The Alliance has eleven members: BMW Group, Chrysler Group LLC, Ford Motor Company ("Ford"), General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, and Volkswagen Group of America. Alliance members are responsible for 77% of all car and light truck sales in the United States.

The Alliance's mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to emerging challenges associated with the manufacture of new automobiles. The Alliance files *amicus curiae* briefs in cases like this that are important to the automo-

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties received timely notice of *amicus*'s intent to file this brief. All parties have consented to its filing, and letters reflecting their consent have been filed with the Clerk.

bile industry. The Alliance has previously filed *amicus* briefs in this very case, including a brief in support of an earlier petition. *See, e.g.*, Br. for the Alliance of Automobile Manufacturers and the National Association of Manufacturers as *Amici Curiae* in Support of Petitioner, *Ford Motor Co. v. Buell-Wilson* (No. 06-1068). As indicated in the present petition, this Court granted the earlier petition, vacated the judgment, and remanded for further consideration. *See* 550 U.S. 931 (2007) (GVR order).

The Alliance's members are deeply concerned about the effects of punitive damages awards on the automobile manufacturing industry. Accidents involving automobiles often result in serious injury or death, even when the automobile manufacturer has complied with all applicable safety statutes and regulations, the automobile includes up-to-date safety features, and the manufacturer took great care in the vehicle's design. In designing an automobile, a manufacturer must necessarily make tradeoffs between product performance and safety, taking into account engineering limitations and cost constraints. But under many state products liability laws, juries are permitted to impose punitive damages based on *post hoc* findings that the manufacturer chose wrongly in making those tradeoffs—*viz.*, that in the jury's view, the risks of the product outweigh its benefits. And, juries often award massive punitive damages when they believe the manufacturer made the wrong choice, even when, as here, the manufacturer's good-faith design choice was consistent with industry standards and federal regulations and therefore objectively reasonable. As a result, manufacturers often have no way of knowing

whether their reasonable design decisions may later be subject to punishment, and thus no ability to structure their conduct in order to avoid such punishment. The Alliance believes that this Court's intervention is needed to ensure that manufacturers are not punished without fair notice that their conduct is unlawful.

INTRODUCTION AND SUMMARY

This Court should grant the petition to address the important question whether the Constitution permits punitive damages to be imposed for conduct that objectively reasonable persons could have concluded was lawful. It is a bedrock principle of procedural due process that a person may not be punished without sufficient notice to allow a "person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). This Court has also repeatedly expressed that "concern for adequate notice" in the punitive damages context. *See, e.g., Philip Morris USA v. Williams*, 549 U.S. 346, 353-55 (2007). But thus far, the Court has only addressed the notice required to ensure that the *severity* of punitive damages comports with due process. The Court has not yet squarely resolved the notice required before a defendant's conduct can be subjected to punishment in the first place. It should do so here.

Although we agree with the arguments made in the petition, we write separately to identify three additional reasons why the Court should grant review.

First, the law of California, like the law of many jurisdictions, allows juries to impose punitive damages for almost any product design decision. In making design decisions, manufacturers must necessarily balance the costs and benefits of particular design features. Yet the law of many jurisdictions allows juries to use this inescapable balancing process as the basis for imposing punitive damages. Under the California Court of Appeal's approach, for example, so long as a jury is properly instructed on the state-law elements of punitive damages, that jury has unbounded discretion to award punitive damages in product liability cases, no matter how objectively reasonable the manufacturer was in concluding that its design choice was lawful. That approach deprives manufacturers of fair notice of when they will be subject to punishment, and makes it impossible for manufacturers to structure their conduct in a way that avoids such punishment.

Second, this Court's seminal criminal procedural decisions support applying due process principles not only to the question whether punitive damages are excessive, but also to the antecedent question whether punishment may be imposed in the first place. As this Court has repeatedly observed, punitive damages share the twin goals of criminal law—deterrence and retribution. In the criminal context, due process affords a defendant greater protections with respect to the threshold decision to impose punishment (the guilt stage) than the determination of the severity of that punishment (the sentencing stage). It follows in the punitive damages context that a defendant is due at least as much process in determining whether its conduct triggers punish-

ment at all as in evaluating the permissible degree of that punishment. This Court should grant review and so hold.

Third, this Court's precedents also provide a straightforward rule for evaluating challenges to the application of a punitive damages statute to particular conduct. A statute fails to provide fair notice, and is thus void for vagueness as applied, when it permits punishment for conduct that reasonable people could conclude was lawful. Without that notice, a defendant cannot conform its conduct to the law in order to avoid punishment. It is clear that the product design at issue here was objectively reasonable: it met the strictest applicable federal regulation, comported with industry standards, was reached after considerable study, and was deemed non-defective by fact-finders eleven times prior to this case. Nonetheless, the California Court of Appeal approved $55 million in punitive damages because a twelfth jury determined not only that the design was defective, but that Ford acted with malice in selecting that design. It is one thing for a jury to decide that the design at issue was defective for purposes of liability and compensation; it is quite another, against these undisputed background facts, to hold that punishment could possibly be justified here.

This Court should reject the approach of the California courts and others, under which, so long as a jury is properly instructed on malice, the U.S. Constitution's guarantee of due process places no limits on the jury's decision to impose punitive damages. Instead, it should reaffirm that manufacturers are due fair notice of when they will be subject to pun-

ishment, and that notice is lacking as a matter of law when a manufacturer could have reasonably believed that its conduct was lawful. Only such an objective standard can ensure that manufacturers will be able to structure their conduct to avoid punishment.

ARGUMENT

A. THE DECISION BELOW ALLOWS JURIES TO IMPOSE PUNITIVE DAMAGES FOR VIRTUALLY ANY DESIGN CHOICE, AND THUS DEPRIVES MANUFACTURERS OF THE FAIR NOTICE REQUIRED BY FEDERAL DUE PROCESS

1. The decision below allows juries to impose punitive damages for almost any product design decision, no matter how objectively reasonable. It is now well understood that massive punitive damages awards have become commonplace in product liability cases. Unlike other kinds of torts, product liability claims (and perhaps, most obviously, automobile defect claims) involve both (i) non-intentional conduct by the defendant and (ii) serious physical injury or death suffered by the plaintiff. In these cases, juries are faced with sympathetic, seriously injured plaintiffs (or their families) and routinely told that their injuries could have been prevented if only the manufacturer had spent more money in designing the product. *See* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. Legal Stud. 107, 116 (2001) (describing the risk that a manufacturer's "superior *ex ante* risk judgments may be outweighed by the *ex post* reality of the accident victim"). This results in "the stark unpredictability

of punitive awards." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008); *id.* at 2623 ("[P]unitive damages overall are higher and more frequent in the United States than they are anywhere else.").

The California Court of Appeal's approach exacerbates that problem by allowing punitive damages to be imposed in essentially any case in which the jury finds that a product is defective. The California punitive damages statute, like the statutes and common law of many other jurisdictions,[2] allows jurors to impose punitive damages on a defendant guilty of, *inter alia*, "malice"—defined in this case as "despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights or safety of others." Pet. at 4. As applied here, that statute allows juries to impose punishment based on a *post hoc* determination that a manufacturer was aware that it could have made the product safer, even when all objective indicators show that the defendant's conduct was reasonable.

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[2] Numerous state punitive damages statutes include a standard comparable to, or even weaker than, California's "malice" requirement. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 347, 358 n.19 (2003) ("States at present require different evidentiary showings to sustain punitive awards. It is no longer the case that malice or wanton conduct is required; increasingly, state legislatures and courts acknowledge that reckless disregard can suffice."). Other state appellate courts, like California's, have declined to consider whether a particular defendant against whom punitive damages were imposed had fair notice. *See, e.g., Palmer v. A.H. Robins*, 684 P.2d 187, 214-15 (Colo. 1984); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 46 (Alaska 1979), *overruled on other grounds* by *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985); *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 756 (N.D. 1989).

In reality, that is no standard at all, because manufacturers are *always* aware both that their products may cause harm and that those products could be made safer if more money were spent. Unfortunately, many products—and certainly automobiles, which are designed to transport people at high speeds—can and do cause serious injury and death. Yet many of the risks associated with certain products are effectively unavoidable, because consumers are unwilling to accept the cost-tradeoffs required to reduce or eliminate those risks. *See, e.g.*, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 13-14 (1993). For example, an automobile manufacturer could make every car it designs a tank, but few consumers could afford to purchase it.

In every products liability case, then, a plaintiff will be able to show that some alternative design, identified years later, could have made the product safer. As one pair of commentators has observed, "[r]egardless of how high the manufacturer sets the design safety standard, when an accident does occur, the plaintiff's lawyer will have an expert to testify the product could have been made safer, and the injury prevented, if the manufacturer had just been willing to spend some additional money." Andrew C. Clausen & Annette M. Carwie, *Problems Applying the* Life of Georgia v. Johnson *Case in the Liability Setting: Where Do We Go With Punitive Damages After* BMW v. Gore*?*, 58 Ala. Law. 46, 48 (1997); *see* Aaron D. Twerski, *Punitive Damages: Through the Five Prisms*, 39 Vill. L. Rev. 353, 356 (1994) ("the modern products liability case comes with 'intent' built in"). In these cases, "[t]he *ex post* perspective

of litigation exerts a hydraulic force that distorts judgment." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring).[3]

For these reasons, the "malice" standard does not itself provide a manufacturer *any* notice of when it will be subject to punishment, nor does it permit the manufacturer to select designs that will avoid substantial punishment years or even decades later. Applying a malice standard to a non-intentional tort case involving serious injury or death is inherently fraught with arbitrariness unless courts take seriously the notice required by federal due process. Rather than engaging that question at all, the Court of Appeal simply noted that since the jury was properly instructed under a statute that is not facially unconstitutional, its due process inquiry was at an end. That is not only fundamentally wrong, it represents common thinking by state appellate courts and creates enormous problems not only for automobile manufacturers but product manufacturers as a whole.

This case is a textbook illustration of the problem. The design at issue here complied with the strictest applicable federal safety standards and also comported with industry standards. Before this trial, eleven cases involving similar claims had gone

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[3] For recent punitive damages awards involving automobile design, *see, e.g.*, *Mraz v. DaimlerChrysler*, No. BC-332487, (Cal. Super. Ct., L.A. County, Mar. 7, 2007) (awarding punitive damages of $50 million); *Mundy v. Ford Motor Co.*, No. 07-A-74503-2 (Ga. Super. Ct., DeKalb County, Apr. 29, 2009) (awarding punitive damages of more than $30 million).

to judgment, and in all eleven, judgment was entered for petitioner. Pet. at 5. Without the constraint of judge-applied objective standards, a twelfth jury imposed substantial punishment based on its own "personal predilections" concerning risk-utility balancing. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (internal quotation marks omitted). This is the precise result procedural due process is meant to prevent. "Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim." *Pac. Mut. Life Ins. Co v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting). An aberrant verdict from the twelfth jury to consider a design is not even remotely the kind of notice that allows manufacturers to "order their behavior" to avoid punishment.

2. A system in which juries are permitted to award punitive damages based solely on subjective risk-utility balancing is not only fundamentally unfair to manufacturers; it creates perverse incentives resulting in direct harm to consumers as well. Empirical evidence shows that many jurors decide to inflict punitive damages *because* a defendant has engaged in risk-utility balancing. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547, 550-51, 556, 589-90 (2000). In other words, jurors conflate intentional *conduct*, such as deciding on a design after a cost-benefit analysis, with intentional *harm*.

Ironically, this sometimes leads juries to punish defendants whose engineers have engaged in the

very thorough study and debate of the risks and benefits of various product designs that the law encourages. Viscusi, *Corporate Risk Analysis*, *supra*, at 550, 558; *see also* Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Product Liability Litigation*, 74 Ky. L.J. 1, 88-89 (1985) (explaining that a responsible manufacturer should balance various factors including risk of harm, durability, ease of operation and manufacture, and cost of materials and labor). Although responsible manufacturers should engage in this kind of balancing *ex ante*, *ex post* it is a "red flag[]" demonstrating a "callous disregard for human health." Viscusi, *Corporate Risk Analysis*, *supra*, at 578; *see also* Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 Wis. L. Rev. 237, 287 n.135 ("It seems widely agreed by both plaintiffs' and defense attorneys that credible trial evidence of cost-benefit balancing—so-called 'trading off lives against dollars'—makes punitive damages particularly likely. This is in stark contrast to the fact that economic efficiency—and deterrence aimed at economic efficiency—requires cost-benefit balancing.").

If manufacturers are subject to punishment under such circumstances, it encourages irresponsible corporate conduct and can even lead manufacturers to stop selling any product that can cause injuries and that some jury *may*, years or even decades later, find could have been made more safe. "[A] firm might be induced to withdraw its product from the marketplace even though consumers place a higher value on the product than its full cost of production, which includes the average harm caused by the

product." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 882 (1998). And even for those manufacturers that continue making their products in the face of this risk, the specter of punitive damages is likely to chill innovation. These results harm manufacturers and consumers alike.

B. THIS COURT'S CRIMINAL CASES SHOW WHY DUE PROCESS LIMITS THE THRESHOLD IMPOSITION OF PUNITIVE DAMAGES

This Court has held in many contexts that defendants may not be punished without fair notice that their conduct will subject them to punishment, so that they can structure their behavior in order to avoid such punishment. The petition explains why the decision below is irreconcilable with this Court's punitive damages cases, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003); *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996), and its void-for-vagueness precedents, *e.g.*, *Hoffman-Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). *See* Pet. at 14-15.

This Court's criminal law cases provide further support for these conclusions. In the criminal law, defendants are entitled to greater procedural protections at the stage when their threshold guilt is determined than at the stage when the severity of their sentence is decided. In the punitive damages context, this Court has repeatedly held that due process limits the extent of punishment that can be imposed. It follows *a fortiori* that due process constraints ap-

ply at the initial stage of deciding whether a defendant is subject to punitive damages.

1. This Court has frequently analogized jury-imposed punitive damages to criminal penalties. "[P]unitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989); *see Philip Morris*, 549 U.S. at 358-59 (Stevens, J., dissenting) ("There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages."). As this Court has explained, while compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," punitive damages "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Imposition of punitive damages, moreover, "is an expression of [a jury's] moral condemnation." *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

Given the "quasi-criminal" nature of punitive damages, *Haslip*, 499 U.S. 1 at 19, this Court has looked to developments in criminal sentencing law for guidance on the permissible extent of punitive damages. In *Exxon Shipping Co.*, for example, this Court—after noting that the "points of similarity" between punitive damages and criminal law "are obvious," 128 S. Ct. at 2628—looked to sentencing developments for instruction on how to attain consistency in damages awards. *Id.* at 2628-29 (explaining that "[t]his federal criminal law development, with

its many state parallels, strongly suggests that as long as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary." (internal quotation marks omitted)). And, in *Gore*, the Court cited a number of criminal cases in announcing guideposts for the review of the severity of punitive damages. 517 U.S. at 575 n.22 (citing, *e.g.*, *Miller v. Florida*, 482 U.S. 423 (1987); *Bouie v. City of Columbia*, 378 U.S. 347 (1964)).

2. It is a basic principle of the criminal law that defendants are afforded greater procedural protections at the guilt stage than at the sentencing stage. For example, defendants have a right to a jury to determine whether they have committed every element of a crime. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). But defendants have no right to a jury to determine their specific sentence. *See United States v. Booker*, 543 U.S. 220, 233 (2005) ("when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."). Similarly, a defendant's guilt must be established beyond a reasonable doubt. *Apprendi*, 530 U.S. at 478. But a judge may determine relevant sentencing factors by a preponderance of the evidence. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91-93 (1986). While the elements of a crime must be set out in an indictment. sentencing factors need not be. *Apprendi*, 530 U.S. at 483. And although at the guilt stage, tribunals "always have been hedged in by strict evidentiary procedural limi-

tations" this is not the case with sentencing. *Williams v. New York*, 337 U.S. 241, 246 (1949). As these differences reflect, heightened procedures apply in the criminal law "when the State threatens to stigmatize or incarcerate an individual for engaging in prohibited conduct." *McMillan*, 477 U.S. at 98 (citing *In re Winship*, 397 U.S. 358, 363-64 (1970)).

3. This Court's holdings in *Gore* and elsewhere impose due process constraints on "the severity of the penalty that a state may impose." *Gore*, 517 U.S. at 559. "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416 (citing *Cooper Indus.*, 532 U.S. at 433). For "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* Given this Court's application of due process constraints on the degree of punitive damages that may be awarded, it follows necessarily that the basic due process principle of fair notice applies to the threshold imposition of punishment. This Court should grant the petition to affirm that fundamental principle.

C. THIS COURT SHOULD HOLD THAT OBJECTIVELY REASONABLE CONDUCT IS NOT SUBJECT TO PUNITIVE DAMAGES

This Court's precedents also provide a rule for evaluating the question whether a manufacturer has sufficient notice that it will be punished for its conduct. That rule is readily administrable, and will avoid the problems plaguing lower-court review of

punitive damages awards in non-intentional tort cases today.

1. This Court has already created the appropriate rule for evaluating challenges like this one through its void-for-vagueness doctrine. Under this Court's precedents, a statute authorizing punishment is so vague that it violates due process when it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). This principle applies in civil cases, and this Court has prohibited civil punishments in a variety of cases where reasonable people acting in good faith could disagree on whether the defendant's conduct was lawful. *See, e.g.*, *Giaccio*, 382 U.S. at 402-03; *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 241-43 (1932); *A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 238-42 (1925); *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915). These precedents all recognize that no punishment is allowed where people "can—and do—disagree" on what conduct the law prohibits. *Colautti v. Franklin*, 439 U.S. 379, 401 (1979).

In *United States v. Lanier*, this Court recognized that the due process vagueness rule is functionally identical to the qualified immunity rule, which protects public officials from civil liability based on legal obligations that are not "clearly established." 520 U.S. 259, 270-71 (1997). As the Court observed, the qualified immunity test for public officers is "simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the

face of vague criminal statutes." *Id.* This Court's opinions establish that officials are entitled to qualified immunity as long as their conduct is "objectively reasonable"—*i.e.*, as long as reasonable officials could conclude that the conduct at issue was lawful. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (immunity available if officers act in "objectively reasonable manner"); *accord Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (under "settled law," officers are entitled to immunity "if a reasonable officer could have believed" that his or her conduct was lawful (internal quotation marks omitted)); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). "[I]f officers of reasonable competence could disagree on [the matter at] issue, immunity should be recognized." *Malley*, 475 U.S. at 341.

That same rule should govern the question of when a defendant has received fair notice that it may be subject to punitive damages. This Court should hold that punitive damages cannot be imposed when the defendant's conduct was objectively reasonable. Only such an objective standard can ensure that manufacturers will be able to tailor their conduct to the law and avoid arbitrary punishment.

2. The facts of this case highlight how the approach applied by the California courts and others, *see supra* n.2, denies manufacturers the fair notice required by due process. The plaintiffs argued that Ford acted with "malice" in designing the Explorer based on two alleged design defects relating to the strength of the vehicle's roof and the alleged tendency of the vehicle to roll over. They claimed that "Ford had the technology to make the Explorer stable and to strengthen the roof to protect the occu-

pant, but did not use it." Pet. App. 53a. In response, Ford showed that its design complied with federal regulations, exceeded industry standards, and were the subject of good-faith debates among engineers about how best to balance performance and safety. Those objective factors demonstrate that reasonable people could differ concerning whether the benefits of the Explorer's design outweighed its risks. At a minimum, they showed that Ford had ample basis for concluding that its product design was reasonable and would not subject it to punishment.

a. A manufacturer's compliance with applicable federal safety requirements indicates the reasonableness of its conduct. In *Gore*, this Court recognized the relevance of compliance with regulatory standards in assessing the appropriateness of punitive damages. There, the Court noted that "BMW could reasonably rely on state disclosure statutes for guidance" in determining "the appropriate line between presumptively minor damage [to automobiles] and damage requiring disclosure to purchasers." 517 U.S. at 579. Other courts have likewise recognized that punitive damages are inappropriate when a manufacturer complies with applicable regulatory schemes. *See, e.g., Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994); *Welch v. Gen. Motors Corp.*, 949 F. Supp. 843, 845 (N.D. Ga. 1996); *Boyette v. L.W. Looney & Son*, 932 F. Supp. 1344, 1348 (D. Utah 1996). A leading treatise agrees that "[i]n most contexts . . . compliance with a statutory standard should bar liability for punitive damages." W. Page Keeton, *Prosser & Keeton on the Law of Torts* 233 n.41 (5th ed. 1984). In this case, Ford demonstrated that the Explorer complied with all

applicable standards promulgated by the National Highway Transportation Safety Administration ("NHTSA"), the federal agency charged with setting automotive safety requirements.

b. Compliance with industry standards offers a further objective indication that punishment is inappropriate. Numerous courts have recognized that punitive damages cannot be justified under the amorphous "malice" standard when a manufacturer's product comports with then-current industry standards. *See, e.g., Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995); *Drabik v. Stanley-Bostitch*, 997 F.2d 496, 510 (8th Cir. 1993); *Nigro v. Remington Arms Co.*, 637 A.2d 983, 989-90 (Pa. Super. Ct. 1993). Here, plaintiffs' Ford Explorer had "one of the best roll-over rates compared to other SUVs in its class.," Pet. App. 25a (internal quotation marks and alteration omitted); the Explorer complied with five commonly used vehicle stability tests, Reporter's Transcript ("RT") 3635-36, 3657; and for ten consecutive years, Consumer's Union awarded the Explorer a "recommended" rating for safety based on independent testing, RT 3232. Those test results demonstrate the effectiveness of the Ford engineers' design. They confirm further that Ford had no basis for predicting that its design could be deemed not only defective but maliciously so.

c. The existence of a good-faith debate over the best design is another objective indicator that reasonable people could disagree over whether a manufacturer's conduct in designing a product was lawful. Many courts have observed that punitive damages are not appropriate when there has been a genuine scientific or engineering debate about a design. *See,*

e.g., *Satcher*, 52 F.3d at 1316-17; *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994).

Here, Ford engineers devoted considerable good-faith efforts to vehicle safety when designing the Explorer. *See* AA 2483-88; AA 2502. In making those decisions, Ford balanced an incremental safety advantage above the levels approved by NHTSA and validated by testing with tradeoffs for consumers in cost and other desirable features. The fact that Ford engineers debated plaintiffs' alleged design defects and came to opposite conclusions shows that the company was engaging in precisely the "line-drawing," *Gore*, 517 U.S. at 579, that a manufacturer must make all the time in selecting a design. The fact that there was a debate in the engineering and regulatory community over the proper standards reveals that Ford lacked fair notice that its decisions could subject it to punitive damages.

* * * * *

Each of these factors demonstrates that Ford's product design was objectively reasonable. In affirming the punitive damages verdict here, the Court of Appeal set aside all of these objective indicators upon which reasonable people would rely, based solely on the fact that the jury was properly instructed, and then decided to impose punitive damages. Pet. App. 28a, 56a-57a. Although proper jury instruction under state law may be necessary, it is insufficient on its own to afford a defendant due process. Without reference to objective standards, punitive damages statutes like the one at issue here can be so vague as applied that manufacturers simply cannot know what non-intentional conduct a jury might later decide warrants punishment. By failing

even to engage in the appropriate due process analysis, the Court of Appeal erred. Because that error is both commonplace in lower courts and devastating to automobile manufacturers, this Court should grant review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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Pursuant to this Court's Rule 37.2, *amicus curiae* respectfully files this brief in support of the petition for certiorari.*

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the Nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 business and professional organizations of every size and in every sector and geographic region of the country. One of the Chamber's most important functions is to represent its members' interests by filing *amicus curiae* briefs in cases involving issues of concern to American business.

There are few issues of greater concern to American business than arbitrary punitive damages awards. For this reason, the Chamber has filed *amicus curiae* briefs in all of the leading punitive damages cases in this Court, including *Philip Morris USA, Inc. v. Williams*, 129 S. Ct. 1436 (2009) (*per curiam*), *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), *Philip Morris USA, Inc. v. Williams*, 549 U.S. 346 (2007), *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *Cooper Indus., Inc. v.*

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* Pursuant to this Court's Rule 37, *amicus* states (1) that it notified the parties of its intent to file this brief and the parties consented, as evidenced by letters filed with the Clerk of this Court, and (2) that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and that no person other than *amicus curiae* or its counsel made such a monetary contribution.

Leatherman Tool Group, Inc., 532 U.S. 424 (2001), *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993), *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). For the reasons stated below, the Chamber believes that the issues presented in this case also warrant review.

REASON FOR GRANTING THE WRIT

The California Court Of Appeal Erred, And Destabilized The Law, By Holding That Compliance With Federal Safety Standards Is Irrelevant In Determining Whether Particular Conduct Is Subject To Punitive Damages.

If the Due Process Clause of the Fourteenth Amendment means anything, it means that States may not impose arbitrary punishments. *See, e.g.*, *Williams*, 549 U.S. at 352-53; *State Farm*, 538 U.S. at 416-17; *BMW*, 517 U.S. at 568. And there is nothing more arbitrary than punishing someone without providing fair notice of the conduct subject to punishment. *See, e.g.*, *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-04 (1966).

This case, of enormous interest to the American business community, calls upon this Court to reaffirm that basic principle. The California Court of Appeal held below that compliance with federal safety standards is irrelevant in determining whether particular conduct is subject to punitive damages. *See* Pet. App. 56-61a. That approach cannot be squared with basic tenets of due process. The point here is simple: just as due process constrains the *amount* of punitive damages that may

be awarded, *see, e.g.*, *State Farm*, 538 U.S. at 416-17; *BMW*, 517 U.S. at 562, due process also constrains the *conduct* for which punitive damages may be awarded. It is arbitrary and unconstitutional to impose *any* amount of punishment where someone lacked fair notice of the conduct subject to punishment. *See, e.g.*, *State Farm*, 538 U.S. at 417 ("'Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice *not only* of the conduct that will subject him to punishment, *but also* of the severity of the penalty that a State may impose.'") (emphasis added; brackets omitted; quoting *BMW*, 517 U.S. at 574).

As this Court has explained, after all, "the point of due process ... is to allow citizens to order their behavior." *State Farm*, 538 U.S. at 418 (internal quotation omitted); *see also Exxon*, 128 S. Ct. at 2627 ("[E]ven Justice Holmes's 'bad man' [should be able to] look ahead with some ability to know what the stakes are in choosing one course of action or another."). In determining whether particular behavior is subject to punishment, it is at the very least highly relevant whether that behavior has been deemed acceptable by government regulators. Because applicable federal safety standards provide objective guideposts of reasonable behavior, courts cannot simply ignore compliance with such standards in determining whether punitive damages are available as a matter of law. "A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim." *State Farm*, 538 U.S. at 418 (internal quotation omitted).

Thus, as many courts and commentators have recognized, compliance with government safety standards presumptively negates the requisite culpability for punitive damages. *See, e.g.*, *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995) (applying Mississippi law); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1058 n.20 (11th Cir. 1994) (applying Alabama law); *Boyette v. L.W. Looney & Son, Inc.*, 932 F. Supp. 1344, 1347-49 (D. Utah 1996) (applying Utah law); *Sloman v. Tambrands, Inc.*, 841 F. Supp. 699, 703 n.8 (D. Md. 1993) (applying Maryland law); *Miles v. Ford Motor Co.*, 922 S.W.2d 572, 589-90 & n.7 (Tex. Ct. App. 1996), *aff'd in part, rev'd in part on other grounds*, 967 S.W.2d 377 (Tex. 1998); *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993); *American Cyanamid Co. v. Roy*, 498 So. 2d 859, 862-63 (Fla. 1986); W. Page Keeton *et al.*, *Prosser & Keeton on Torts* § 36, at 233 n.41 (5th ed. 1984) (compliance with a safety standard should presumptively bar punitive damages); Paul Dueffert, Note, *The Role of Regulatory Compliance in Tort Actions*, 26 Harv. J. Legis. 175, 199-200 (1989) (same); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 41-42 & n.196 (1982) (same). Were the law otherwise, persons would lack constitutionally adequate notice that their conduct was subject to punishment, and any ability to "order their behavior" to avoid punishment. *State Farm*, 538 U.S. at 418 (internal quotation omitted).

The court below, however, upheld an award of $55 million in punitive damages by insisting that the jury here could have found "by clear and convincing evidence that [Ford] acted with fraud, malice or

oppression" in manufacturing the popular 1997 Explorer 4x4 *regardless* of whether that vehicle complied with federal safety standards. Pet. App. 52a, 56-61a. Indeed, the court gave *no weight whatsoever* to compliance with such standards. According to the court, the key point here is that federal safety standards do not preempt state law. *See id.* at 58a. From that point, the court drew the conclusion that compliance with federal safety standards is *irrelevant* in assessing the availability of punitive damages as a constitutional matter. *See id.*; *see also id.* at 57a ("'[G]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products.'") (quoting *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 810 (1981)); *id.* ("'Punitive damages ... remain as the most effective remedy for consumer protection against defectively designed mass produced articles.'") (quoting *Grimshaw*, 119 Cal. App. 3d at 810).

But that conclusion is a *non sequitur*. Whether a federal statute allows state law to impose punitive damages for conduct that complies with federal safety standards has no bearing on whether the federal Constitution allows States to impose punitive damages for such conduct. Because a federal statute cannot authorize a federal constitutional violation, an absence of federal preemption cannot immunize an award of punitive damages from due process scrutiny. The petitioner here is making a constitutional argument, not a statutory argument. *See* Pet. 18 n.2.

Contrary to the California Court of Appeal's conclusion, the key point here is that compliance with federal safety standards is a crucial consideration in federal due process scrutiny of punitive damages awards, whether with respect to their amount or their availability. As this Court has long recognized, due process limits the extent to which States may abrogate traditional legal protections against punishment, including the imposition of punitive damages. *See, e.g.*, *Oberg*, 512 U.S. at 430; *see also id.* at 436 (Scalia, J., concurring). Just as a State may not abrogate traditional judicial review of the amount of punitive damages awards, *see id.*, a State may not abrogate traditional limitations on the degree of culpability necessary to justify punitive damages in the first place.

The California Court of Appeal's attempt to cloak the punitive damages award at issue here with the legitimacy of the common law is thus misguided. *See* Pet. App. 58a ("Punitive damages have long been a part of the common law, originating in the 1763 Enlgish case *Huckle v. Money* (1763) 95 Eng. Rep. 768, and finding early acceptance in the United States when the United States Supreme Court upheld their constitutionality in *Day v. Woodworth* (1851) 54 U.S. (13 How.) 363, 370."). At common law, punitive damages were strictly reserved for a narrow class of cases—torts involving "intentional and deliberate [misconduct], and ha[ving] the character of outrage frequently associated with crime." *Prosser & Keeton on Torts* § 2, at 9; *see also Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 111 (1893) ("[C]riminal intent [is] necessary to warrant the imposition of [punitive] damages."), *id.* at 114

("unlawful and criminal intent" required for punitive damages); *Smith v. Wade*, 461 U.S. 30, 78-79 n.12 (1983) (Rehnquist, J., dissenting) (describing the highly culpable state of mind required for punitive damages at common law).

Accordingly, at common law, courts submitted the issue of punitive damages to a jury only in extraordinary cases, and appellate courts were not hesitant to reverse based on insufficient evidence of the requisite extreme culpability (even where the jury in fact had awarded punitive damages). *See, e.g., Philadelphia, Wilmington & Baltimore R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 214 (1859) ("[T]he malice [necessary to sustain a punitive damages award] is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations.").

The award at issue here cannot remotely survive scrutiny under these traditional common law standards. By refusing to consider Ford's compliance with federal safety standards in determining whether Ford's conduct was subject to punitive damages, the California Court of Appeal effectively drained the "fraud malice or oppression standard" of its common law meaning. It is one thing to say that California may compel Ford to *compensate* the plaintiff for her injuries; it is another thing altogether to say that California may *punish* Ford for manufacturing a motor vehicle that complied with federal safety standards. Under federal law, "[t]he Secretary of Transportation shall prescribe motor vehicle safety standards" that "shall ... meet the need for motor vehicle safety." 49 U.S.C. § 30111. If

the Secretary has concluded that a motor vehicle satisfies the safety standards enacted pursuant to this statutory mandate, it is hard to see how a manufacturer can be deemed to have acted with the requisite extreme culpability by concluding likewise, or how the manufacturer was given constitutionally adequate notice that its conduct was subject to punishment.

Plaintiffs here allege that the 1997 Ford Explorer was defective in two interrelated respects. According to plaintiffs, the vehicle was insufficiently stable (and thus prone to rollover), and its roof was insufficiently strong (and thus prone to allow injuries in the event of a rollover). Plaintiffs' theory of defect necessarily encompasses *both* of these allegations—an insufficiently stable vehicle *per se* would not be defective, if the vehicle were otherwise strong enough to prevent injuries. *See, e.g.*, Pet. App. 16a ("The Wilsons presented evidence that rollovers are relatively nonviolent events for the occupants when they are properly restrained and there is minimal roof intrusion, and occupants are killed or disabled only when the roof crushes inward.").

With respect to roof strength, the California Court of Appeal did not deny that the 1997 Ford Explorer's roof met or exceeded the relevant federal safety standard, Federal Motor Vehicle Safety Standard ("FMVSS") 216. *See* Pet. App. 56-57a. Rather, the court simply insisted that federal motor vehicle safety standards do not preempt state tort law. *See* Pet. App. 58-59a. But, as noted above, that is a *non sequitur*. The issue here is not whether a State may impose *liability* for conduct that complies with all applicable federal safety standards, but

whether a State may *punish* a defendant for manufacturing a motor vehicle that complies with such standards. Under traditional common-law norms underlying federal due-process protection, it may not. *See, e.g., Brand v. Mazda Motor Corp.*, 978 F. Supp. 1382, 1394-95 (D. Kan. 1997); *Welch v. General Motors Corp.*, 949 F. Supp. 843, 844-46 (N.D. Ga. 1996); *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 826 (Fla. 1986); *Miles*, 922 S.W.2d at 589-90 & n.7; *see also* Owen, *Problems*, 49 U. Chi. L. Rev. at 42 n.196.

With respect to vehicle stability, the California Court of Appeal asserted that "there are no federal standards for stability of vehicles." Pet. App. 60a. That assertion is disingenuous at best. The Federal Government carefully studied the issue for three decades and decided *not* to impose a federal safety standard, on the ground that any such standard would compromise a vehicle's safety in other ways. *See* 52 Fed. Reg. 49033, 49036 (Dec. 29, 1987). Thus, rather than imposing a rollover standard, the Federal Government since 1984 instead has required manufacturers to provide consumers with information and warnings on rollover risk. *See* 49 Fed. Reg. 20016 (May 11, 1984); *see also* 66 Fed. Reg. 3388, 3403 (January 12, 2001); 49 C.F.R. Part 575. And the Federal Government has specifically rejected the very stability tests on which plaintiffs relied below (the so-called "stability index test" and "Consumers Union test"). *See* 62 Fed. Reg. 40602, 40602 (July 29, 1997); 59 Fed. Reg. 33254, 33258-59 (June 28, 1994); 57 Fed. Reg. 242, 248 (Jan. 3, 1992); 61 Fed. Reg. 28550, 28553 (June 5, 1996); 53 Fed. Reg. 34866, 34866-67 (Sept. 8, 1988); 53 Fed. Reg. 12218, 12219-20 (April 13, 1988). The decision to

provide a warning and information on rollover risk, rather than a safety standard, thus represents a clear policy choice; contrary to the Court of Appeal's suggestion, this is not a situation involving a regulatory void, but rather a situation involving a deliberate regulatory choice.

Under these circumstances, the California Court of Appeal's holding that compliance with federal safety standards is irrelevant in determining whether punitive damages are available here cannot withstand constitutional scrutiny. To let that holding stand would be to leave the financial future of the motor vehicle industry (and American business and economic life more generally) at the whim of individual juries. *See, e.g., Liesener v. Weslo, Inc.*, 775 F. Supp. 857, 861-62 (D. Md. 1991) ("It would be intolerable to hold that a manufacturer must, to escape punitive damages, follow the path of timidity and greatest caution ... shaped by the most pro-plaintiff result possible, especially where the manufacturer's conduct conforms to widely-recognized industry standards."). As Maryland's highest court noted in a similar context:

> Punitive damage awards can only affect behavior if an actor is able to conform to established standards of conduct. If the standards are constantly changing, the actor may be unable to predict accurately the line that separates desirable from undesirable conduct. A potential defendant will either become too cautious, refusing to engage in socially beneficial behavior or will follow a course of behavior that imposes more harm on society than benefit.

Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 652 n.19 (Md. 1992) (internal quotations omitted).

It goes without saying that the American business community has an acute interest in preventing the arbitrary imposition of punitive damages based on conduct that complies with reasonable objective guideposts for appropriate behavior, including federal safety standards. At the end of the day, when a manufacturer relies "in good faith on the current state of the art in safety concerns, and on conclusions by the governmental agencies charged with administering safety regulations in the area of its product that the product is not unreasonably dangerous, it cannot be said to have acted with an entire want of care showing conscious indifference to the safety of product users." *Miles*, 922 S.W.2d at 589. Because the 1997 Ford Explorer complied with all applicable federal safety standards, this Court should not allow the decision below to stand.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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No. 09-297

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* DRI[1]

Amicus curiae DRI—the Voice of the Defense Bar, which is celebrating its 50th anniversary this year, is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of the defense attorney, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. To promote these objectives, DRI participates as *amicus* in cases that raise issues of importance to its membership and to the judicial system.

Recently, DRI has filed *amicus* briefs in cases involving the inconsistent application of law to issues of national importance. See, *e.g.*, *Stolt-Nielsen S.A.* v. *Animalfeeds Int'l Corp.*, No. 08-1198 (U.S.). DRI long has been a participant in cases involving due process issues, including fair notice, relevant to punitive damages. See *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003), *Gasperini* v.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have received timely notice of *amicus curiae*'s intent to file this brief and have consented to the filing of this brief in letters on file with the Clerk's office.

Center for Humanities, Inc., 518 U.S. 415 (1996); *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

The decision below raises issues of special concern to DRI and its members. Although this Court has established a number of guideposts for determining when the *amount* of punitive damages impermissibly exceeds due process limits, there remains a need for additional clarity about when primary conduct is subject to any punitive damages at all. This need is particularly acute in the context of regulated conduct where an entity—having complied with detailed safety requirements established by a government entity charged with determining the appropriate level of public safety or industry standards reflecting a high degree of care—can hardly be expected to imagine that such primary conduct would later be exposed to punitive damages.

Additional guidance from this Court is needed to clarify the circumstances in which full compliance with federal, state, or industry standards is still not sufficient to avoid punishment by way of punitive damages, given the requirement that the defendant should be entitled to fair notice before such punishment can be meted out consistent with due process. In the absence of such guidance, awards of punitive damages remain marked by unacceptable unpredictability. Here, for example, although the California Court of Appeal points to no dispute that the defendant complied with detailed federal and industry standards regarding the very design points at issue in the litigation, the jury was instructed that compliance with such standards "does not exempt" the defendant from liability. Special Jury Instruction No. 5, *Buell-Wilson* v. *Ford Motor Co.*, No. GIC800836 (Cal. Sup. Ct. June 3, 2004). The jury

was further instructed that there is "no fixed standard" regarding punitive damages and given no objective benchmarks for determining whether such damages were warranted. Jury Instruction, No. 3949. Left without any meaningful guidance, the jury awarded $246 million in punitive damages (twice what the plaintiffs sought)—which the court later reduced to $55 million based on due process excessiveness principles. Pet. App. 4a, 6a. As to the fundamental question whether any punitive damages were warranted in light of such compliance, the defendant did not even receive a case-specific analysis from the court before going to the jury.

The lower and state courts' confusion over whether and when compliance with regulatory and industry standards is sufficient to preclude punitive damages calls out for this Court's review. As it stands, the utter randomness of when a regulated entity's conduct can be subject to punitive damages is not tolerable. This Court should grant certiorari and confirm that fundamental notions of due process dictate that punitive damages can be imposed only where a defendant has fair notice, based on objective standards, that particular conduct is subject to punishment.

INTRODUCTION

This case represents a disturbing trend for defendants: An enormous punitive damages award (originally well beyond what the plaintiff sought) is handed down by a jury with respect to injuries suffered from an accident involving a product built in conformance with substantial, directly applicable federal regulations and industry standards. In this context, objective standards do not exist under California state law that allow a regulated entity to

figure out what it must do to avoid being subject to punitive damages. As the law stands in California and other States, even for products that comply with applicable objective standards, the simple *post hoc* notion that a product could be made safer or better—as all products in some sense can be—appears sufficient by itself to support an award of punitive damages. Indeed, it appears California courts have concluded that compliance with federal, state, and industry standards is *irrelevant* to the imposition of punitive damages. This violates the fundamental due process requirement of fair notice. The court should grant certiorari to preclude States from imposing punitive damages on defendants in the absence of established, objective criteria putting the defendant on fair notice of what is required of it.

A fundamental aspect of due process is knowing what conduct potentially is subject to punishment. These notice principles apply with equal force to imposing punitive damages in the civil context. We do not doubt that in some circumstances compliance with government or industry standards will not be enough to immunize regulated entities from compensating injured parties. It is another matter entirely, however, to expose such parties to punishment. Where a defendant has complied with extensive government requirements or industry standards, it is hard to see how it can be said that the entity acted with the heightened intent, such as malice, typically required to impose punitive damages. In such a case, elemental notions of notice and the purpose of punitive damages—to deter future improper conduct and to punish prior bad conduct—is absent. Compliance with objective federal, state, and industry standards must be taken fully into account before any punishment is imposed.

Where a regulated entity complies with all applicable federal and industry regulatory standards regarding the matters at issue in the litigation, and these standards impose detailed and substantial safety requirements, there is no reasonable way to anticipate the kind of result and award in this case. This is underscored by the fact that eleven other juries found no compensatory damages, let alone punitive damages, were warranted in similar cases involving the same alleged defect. There is no way to conform primary conduct to these types of random jury awards. The purposes of punishment—deterrence and retribution—are rendered meaningless where a regulated entity would not reasonably know its conduct is open to punishment.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S REVIEW IS NEEDED TO CLARIFY THAT DUE PROCESS REQUIRES OBJECTIVE STANDARDS THAT PROVIDE FAIR NOTICE THAT PRIMARY CONDUCT MAY BE SUBJECT TO PUNITIVE DAMAGES.

The Due Process Clause of the Fourteenth Amendment protects defendants against arbitrary punishment by States. A fundamental aspect of due process is fair notice of what conduct is illegal and the consequences for not meeting that standard. See, *e.g.*, *International Union* v. *Bagwell*, 512 U.S. 821, 836-37 (1994) ("Due process traditionally requires that criminal laws provide prior notice both of the conduct to be prohibited and of the sanction to be imposed."); *Bouie* v. *City of Columbia*, 378 U.S. 347, 350-51 (1964) ("The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this

Court."); *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) ("To make the warning [that criminal liability is possible] fair, so far as possible the line should be clear."). Fair notice also undergirds the traditional rule of lenity. See generally *United States* v. *Bass*, 404 U.S. 336, 348 (1971) ("where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant"); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-97, 105-06 (1820) (Marshall, C.J.) (explaining the rule of lenity).

The "constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Id.*

These fair notice requirements apply with equal force to the context of civil punitive damages. See, *e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 n.22 (1996) ("[T]he basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil *penalties*.") (citation omitted). This follows because "these awards serve the same purposes as criminal penalties," namely to punish conduct the defendant was on notice was illegal and to deter future bad conduct. *Campbell*, 538 U.S. at 416 ("punitive damages serve a broader function [than compensatories]; they are aimed at deterrence and retribution"); *accord Phillip Morris USA* v. *Williams*, 549 U.S. 346, 352 (2007) ("'[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition'")

(alteration in original) (quoting *BMW*, 517 U.S. at 568).

For these reasons, punitive damages typically require a showing of highly culpable intent, such as malice, conscious disregard for safety, or other despicable conduct. See, *e.g.*, *Philadelphia, Wilmington & Baltimore R.R.* v. *Quigley*, 62 U.S. (21 How.) 202, 213-14 (1858) (observing that the malice required for punitive damages "implies that the act complained of was conceived in a spirit of mischief, or of criminal indifference to civil obligations").

The Court's precedents make clear that due process constrains not only the severity of punitive damages, but also whether *any* punitive damages may be imposed at all. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574; see also *Campbell*, 538 U.S. at 416 (due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor").

Particularly because civil defendants lack the full range of protections criminal defendants receive, the Court has expressed significant "concerns over the imprecise manner in which punitive damages systems are administered" and the "acute danger of arbitrary deprivation of property." *Campbell*, 538 U.S. at 417. This Court also has recognized that these concerns are magnified when jury instructions give wide discretion and provide few objective criteria for the jury to consider. *Id.* at 417-18. Accordingly it has long been

> established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.

Giaccio v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966). For example, in considering punitive damages based on injuries to non-parties, the Court rejected the "near standardless dimension to the punitive damages equation" in which "[t]he jury will be left to speculate" thereby creating a circumstance in which "the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified." *Philip Morris*, 549 U.S. at 354; see also *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2640 (2008) (Breyer, J., concurring) (explaining the "need, grounded in the rule of law itself, to assure that punitive damages are awarded according to meaningful standards that will provide notice of how harshly certain acts will be punished and that will help to assure the uniform treatment of similarly situated persons").

Given these concerns, the Court's precedents make clear that due process requires an *objective* standard for imposing punishment. For example, in *Safeco Insurance Co. of America* v. *Burr*, 551 U.S. 47 (2007), in assessing whether a defendant recklessly disregarded the terms of the Fair Credit Reporting Act, the Court explained that although it disagreed with the defendant's erroneous reading of the pertinent statute, the defendant's interpretation was not "objectively unreasonable." *Id.* at 70 ("Given this dearth of guidance and the less-than-pellucid

statutory text, [defendant's] reading was not objectively unreasonable, and so falls well short of ... [evidencing] reckless liability."); cf. *United States* v. *Lanier*, 520 U.S. 259, 270 (1997) (explaining that the qualified immunity inquiry, like the fair notice one, is objective and "seeks to ensure that defendants reasonably can anticipate when their conduct may give rise to liability by attaching liability only if the contours of the right violated are sufficiently clear that a reasonable [defendant] would understand" that the conduct violates the pertinent legal standard) (internal quotation and alteration omitted). Thus, an objective standard is inherent in the very nature of "fair notice."

In response to these concerns, the Court has on several occasions established parameters for determining whether an award of punitive damages is unconstitutionally excessive. See, *e.g.*, *BMW*, 517 U.S. at 575. These guideposts include, "the degree of reprehensibility" of the conduct; the "disparity" between the compensatory and punitive aspects of the award; and the difference between the punitive damages award "and the civil penalties authorized or imposed in comparable cases." *Id.*

This case presents an opportunity for the Court to address an even more fundamental question—when a regulated entity has fair notice of objective standards regarding the type of conduct subject to punitive damages. See generally *Browning-Ferris*, 492 U.S. at 277 ("[W]e have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. That inquiry must await another day.") (citation omitted); *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concur-

ring in judgment) (observing that whether an entity had "advance notice of what conduct could render it liable for punitive damages" and "permitting juries to impose unlimited punitive damages on an ad hoc basis" has "touched on a due process issue that I think is worthy of the Court's attention in an appropriate case"). This case presents that question cleanly and the time for the Court to resolve it has come.

At a minimum, under existing due process standards, regulated entities should be entitled to a legal analysis by the court of whether their own conduct was objectively reasonable vis-à-vis objective guideposts such as pertinent government and industry standards. An objective standard for determining the illicit intent or conduct needed to support an award of punitive damages is critical to ensure that regulated entities can order their conduct *ex ante* to avoid punishment.

II. REVIEW IS NEEDED TO ADDRESS THE CIRCUMSTANCES IN WHICH COMPLIANCE WITH GOVERNMENT AND INDUSTRY STANDARDS LIMITS OR PRECLUDES THE IMPOSITION OF PUNITIVE DAMAGES.

Potential defendants across a variety of industries organize their conduct—and thus receive notice of what acts may lead to the imposition of liability—by reference to a web of federal, state, and local regulations, as well as to detailed and rigorous industry standards. Like petitioner here, many manufacturers have regular interaction with the bodies that regulate them, and go to great lengths to conform their conduct to the requirements established by those regulators.

Regulators' core responsibilities often include conducting risk-benefit analyses. See, *e.g.*, *Conde* v. *Velsicol Chem. Corp.*, 24 F.3d 809, 811 (6th Cir. 1994) (discussing EPA's risk-benefit analyses); *Rhone-Poulenc, Inc* v. *FDA*, 636 F.2d 750, 754 (D.C. Cir. 1980) (per curiam) (same, FDA); *First Nat'l Bank in Albuquerque* v. *United States*, 552 F.2d 370, 376-77 (10th Cir. 1977) (same, Department of Agriculture); see also *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983) (requiring that agency's rule-making give consideration to "effective and cost-beneficial" technology). Whether by setting standards, determining whether a product or activity meets those standards, or by directly analyzing the product or activity across a range of criteria, regulators often make threshold determinations that potential negative social consequences do not outweigh potential gains.

As part of this inquiry, regulatory bodies necessarily recognize that there is "no free lunch" in striking this balance. That is, in many cases, it may not be possible to increase the notion of "safety" in one respect without reducing it in another respect or imposing other significant costs. A change that reduces potential injuries of one kind may actually increase the risk of another type of injury. Put another way, subject only to the limits of what technology and the laws of nature will permit, many products can be made "safer" in the abstract. But that gain often can be made only at the cost of making it less effective, unusable for its intended use, or potentially too expensive to be of any real value to most consumers. See, *e.g.*, W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 307 (1998) (discussing "the exorbitant costs of

reducing risks to a zero level"); Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 13-14 (1993) ("It seems unlikely that the public would pay 24 to 60 times more per car to save far fewer lives."); Restatement (Third) of Torts: Products Liability § 2, cmt. a (1998) ("Society does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky.").

In the automobile industry and a host of other fields, legislatures, regulators, and other technical bodies are best positioned—possessing the expertise and global perspective—to assess what tradeoffs are efficient and necessary. See generally *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 876-80 (2000) (discussing the range of considerations the Department of Transportation and the National Highway Traffic Safety Administration (NHTSA) assess before striking a regulatory balance in establishing federal standards). As many commentators have explained, "legislative bodies and regulatory agencies are better equipped than courts to formulate effective safety standards." Richard C. Ausness et al., *Providing a Safe Harbor for Those Who Play by the Rules*, 2008 Utah L. Rev. 115, 132-33; *id.* at 133 n.160 (discussing this principle in the context of automobile safety); see, *e.g.*, Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 Colum. L. Rev. 277, 333-35 (1985).

Unlike a jury, which sees accidents and other negative effects of a product or activity only in hindsight without sufficient perspective about the typical benefits, regulators must set standards that prospectively account for social costs and benefits

overall. Cf. Oral Argument, *Warner Lambert Co.* v. *Kent*, No. 06-1498, 2008 WL 495030, at *30 (U.S. Feb. 25, 2008) ("Now, who would you rather have make the decision as to whether this drug is, on balance, going to save people or, on balance, going to hurt people? An expert agency, on the one hand, or 12 people pulled randomly for a jury rol[l] who see before them only the people whom the drug hurt and don't see those who need the drug to cure them?").

The federal safety standards at issue in this case, for instance, involve highly complex issues and are administered by the NHTSA, which is empowered to "prescribe motor vehicle standards" and "carry out needed safety research and development." 49 U.S.C. § 30101. NHTSA has formidable technical expertise that permits it to fulfill these functions. See, *e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 53 (noting "agency's discretion to pass upon the generalizability of ... field studies .... is precisely the type of issue which rests within the expertise of NHTSA, and upon which a reviewing court must be most hesitant to intrude"); *Center for Auto Safety* v. *Peck*, 751 F.2d 1336, 1360 (D.C. Cir. 1985) (Scalia, J.) ("[E]ngineering judgment is assuredly the sort of expertise that NHTSA preeminently possesses.").

Here, the NHTSA had directly applied its considerable technical expertise to the stability and roof safety issues implicated by the plaintiffs' claims and the punitive damages verdict. For instance, NHTSA studied stability safety issues for decades and adopted standards that provided for consumer safety without "reduc[ing] the capability of utility vehicles." 52 Fed. Reg. 49033, 49036-37 (Dec. 29, 1987). The agency also explained in detail that imposition of certain rollover standards would

require other safety sacrifices that it was unwilling to make:

> [V]ehicle rollover stability is not the same as vehicle handling and control. Some measures that improve [rollover] do not necessarily result in improved directional control and stability.... [D]irectional control and stability would be adversely affected as a result of relying upon suspension changes to make small increases in the vehicle safety metrics.

61 Fed. Reg. 28550, 28552-53 (June 5, 1996).[2] Similarly, the agency specifically studied roof safety and promulgated standards governing the issue. See 49 C.F.R. § 571.216 (commonly known as FMVSS 216); see 36 Fed. Reg. 23299, 23299 (Dec. 8, 1971) (discussing findings based on available data, and stating "[t]he roof crush standard will provide protection in rollover accidents"); see also Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49223 (Aug. 23, 2005).

In this light and in similar circumstances, the objective standards imposed by agencies—which rest upon their superior technical expertise and their determinations that meeting the standards will have desirable consequences—should be deemed highly relevant, if not dispositive, for due process purposes. A regulated entity's effort to comply with meaningful government standards on safety or efficacy is telling. Evidence of such efforts should be relevant to, if not outright preclude, the conclusion that the defendant

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[2] Safety rarely, if ever, is a zero-sum game. *See, e.g.*, John D. Graham, *Product Liability and Motor Vehicle Safety, in The Liability Maze* 120, 126 (Peter Huber & Robert E. Litan eds., 1991) (noting that some safety features may increase exposure to liability claims related to those features).

had notice that the very conduct found by the regulator to be appropriate nonetheless may give rise to the imposition of punishment in the form of punitive damages. As here, where "malice" is required for the imposition of punitive damages, a company's dutiful compliance with the law is simply not reconcilable with the *mens rea* required for the punishment. See, *e.g.*, Ausness, *supra*, at 155 ("[E]ven if safety standards are not optimal, good faith compliance with them would still be inconsistent with the type of intent that is necessary to impose punitive damages."); 2 Am. Law Inst., *Enterprise Responsibility for Personal Injury—Reporters' Study* 95, 101 (1991) ("If a defendant has fully complied with a regulatory requirement ... it is hard to justify the jury's freedom to award punitive damages."), *quoted in* Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued By the Supreme Court of the United States in* Haslip, 42 Am. U. L. Rev. 1365, 1383 (1993); cf. *Geier*, 529 U.S. at 893 (Stevens, J., dissenting) (noting that compliance with federal regulations "would presumably weigh against an award of punitive damages").

At times, of course, the balance struck by a company and approved by the applicable regulatory body is not perfect. An error may cause a harm that would have been avoidable through a socially beneficial additional expenditure on safety. It is one thing for a State to assess liability for negligence or strict liability in the face of such errors.[3] But it is

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[3] Of course, depending on the nature of the congressional scheme, the specific regulatory action, and the claim at issue, such conduct also may be subject to a preemption analysis. Preemption is not, however, being invoked by petitioner here. *See* Pet. 18 n.2.

altogether another matter to impute "malice" to what was, at most, a defendant's reasonable error in judgment that the expert regulatory body also made.

Unless compliance with regulatory standards or state-of-the-art industry guidelines are appropriately considered in the due process inquiry, there is significant danger that juries will continue to conflate mere awareness of potential risks with malice—unconstitutionally imposing punishment without meaningful notice as a result. In some sense, in every case, a regulated entity might be said to be aware that its product or activity creates a certain degree of risk, which is why compensatory awards may remain legitimate in some cases. Yet, in assessing whether constitutionally sufficient notice exists for a punitive award, there must be a clear line demarcating that mere knowledge of potential, sometimes inevitable, risk from the knowledge and conduct that reaches the level of malice. Otherwise, as under the rule of the court below, there is the absurd result that every potential defendant is viewed effectively to have sufficient notice that it may be liable for punitive damages simply for understanding a universal truth, *viz.* more safety is always theoretically possible. Under this improper view, compliance with objective federal, state and industry standards is irrelevant to the imposition of punitive damages. That, however, is no way to impute notice and impose a punishment akin to a criminal sanction. Such a misguided rule stands in great tension with principles of notice that have remained constant in this Court's criminal jurisprudence. See *McBoyle*, 283 U.S. at 27 ("To make the warning [that criminal liability is possible] fair, so far as possible the line should be clear."); *accord Bass*, 404 U.S. at 348; see also *Wiltberger*, 18 U.S. (5 Wheat.) at 95-97, 105-06.

III. THE DECISION BELOW CONFLICTS WITH MANY WELL-REASONED DECISIONS HOLDING THAT COMPLIANCE WITH OBJECTIVE GOVERNMENT AND INDUSTRY STANDARDS IS RELEVANT TO OR PRECLUDES PUNITIVE DAMAGES.

There is a deep and growing division about whether compliance with government or industry standards negates the culpable conduct often essential to awarding punitive damages.

Many courts have recognized that compliance with objective standards—be they imposed by a government or industry body—precludes or otherwise limits the imposition of punitive damages because such conduct is irreconcilable with the highly culpable mental state typically necessary to award punitive damages. An entity that has endeavored to comply with specific and meaningful standards enacted by a government regulator (or recognized industry standard setters) charged with ensuring safety and other societal goods, or industry standards evidencing a high degree of care, cannot be said to have acted with the malice typically needed to award punitive damages.

For example, in reversing a punitive damages award, the Georgia Supreme Court held that "compliance with county, state, and federal regulations is not the type of behavior which supports an award of punitive damages; indeed, punitive damages, the purpose of which is to 'punish, penalize or deter' are, as a general rule, improper where a defendant has adhered to environmental and safety regulations." *Stone Man, Inc.* v. *Green*, 435 S.E. 2d 205, 206 (Ga. 1993). This follows because such compliance "tend[s] to show that there is no clear and convincing evidence of 'willful misconduct, malice,

fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences.'" *Id.* (quoting *General Refactories, Co.* v. *Rogers*, 239 S.E.2d 795, 798 (Ga. 1977)). Similarly, the District of Maryland recognized that where a "defendant successfully proved that it complied with federal regulations, the Court concludes that [defendant] did not act with malice ... and thus plaintiff is not entitled to punitive damages." *Sloman* v. *Tambrands, Inc.*, 841 F. Supp. 699, 704 n.8 (D. Md. 1993).

In the same vein—in a case that presents particular problems for the rule of law because it involved Ford, the petitioner here, and comes to a different result than this case—the Texas Court of Appeals concluded that when a defendant "relies in good faith ... on conclusions by the governmental agencies charged with administering safety regulations in the area of its product that the product is not unreasonably dangerous, it cannot be said ... to have acted with conscious indifference to an extreme risk." *Miles* v. *Ford Motor Co.*, 922 S.W.2d 572, 589-90 (Tex. App. 1996) (reversing jury's finding of malice as unsupported by the evidence and remanding for a new trial), *rev'd on other grounds*, 967 S.W.2d 377 (Tex. 1998); see *General Motors Corp.* v. *Iracheta*, 90 S.W.3d 725, 741 (Tex. App. 2002) ("In *Miles*, the court of appeals recognized that most commentators suggest that compliance with a safety standard should bar liability for punitive damages."), *rev'd on other grounds*, 161 S.W.3d 462 (Tex. 2005). This follows because even when a defendant's decision about a product, in retrospect, "may have turned out to be a mistake (ordinary negligence), it certainly cannot be said to have been a decision ... in spite of a

known extreme risk of harm." *Miles*, 922 S.W.2d at 590 (emphasis added).

Similarly, the Missouri Court of Appeals has explained that "[c]ompliance with industry standard and custom impinges to prove that the defendant acted with a nonculpable state of mind ... and hence to negate any inference of complete indifference ... for the safety of others the proof of punitive damages entails." *Lane* v. *Amsted Indus., Inc.*, 779 S.W.2d 754, 759 (Mo. Ct. App. 1989).

The court below and other courts, unfortunately, follow a different path. See, *e.g.*, *Dorsey* v. *Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. Unit B Sept. 1981); *Brand* v. *Mazda Motor Corp.*, 978 F. Supp. 1382, 1387-88, 1391-93 (D. Kan. 1997). The decision below provides a particularly stark example. Based on a nearly three decades' old decision, *Grimshaw* v. *Ford Motor Co.*, 199 Cal. App. 3d 757, 811 (1981), the court below concluded that federal safety standards are *irrelevant* to the notice aspect of the due process inquiry and do not even entitle defendants to a case-specific analysis. See Pet. App. 61a-62a. But *Grimshaw* did not involve a defense of compliance with existing regulatory standards, but dealt with industry standards alone. See 199 Cal. App. 3d at 803; *accord* Pet. App. 27a-28a. Neither *Grimshaw* nor any case on which it relied cited the United States Constitution or appeared to consider an as-applied federal due process challenge. See *Grimshaw*, 199 Cal. App. 3d at 811 (collecting cases). In all events, the approach of the court below was improper because it ignored substantial developments in this Court's jurisprudence concerning the due process implications of awarding punitive damages, see, *e.g.*, *Campbell*, 538 U.S. at 416-17, as

well as regulatory activity that has occurred since that time.

Any purported "analysis" by the court below, and there was none in any meaningful sense, is no more than *ipse dixit*. See Pet. App. 61a-62a; see also *id.* at 27a-28a. The court failed to analyze within the context of this Court's due process precedents how a defendant's compliance with industry standards shapes what notice it has about the nature and extent of its liability. Moreover, the court below did not even attempt to grapple with notice in light of existing regulation. It should go without saying that the emerging efforts to regulate automobile safety at the time of the accident in *Grimshaw* bear little resemblance to the well-defined regulatory state of today. As described above, the DOT and NHTSA have a primary role in assessing the sufficiency of automobile safety measures, including those directly implicated by petitioner's claims. See § II, *supra*. This and other courts have acknowledged the expertise of those regulators and deferred to their policy judgments as rational, see *id.*, which should carry some weight in the notice inquiry.

The court below instead opined that compliance with prevailing objective standards was not controlling—not only for purposes of negligence and strict liability, but also for determining malice itself—because Ford supposedly knew it could make the Explorer safer, but declined to do so because of economic considerations. But this is nothing more than a tautology. As discussed above, any product can be made safer in some sense at a cost. See § II, *supra*; see also *United States* v. *Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.). Moreover, except by reference to the existing regulatory and industry standards, a party has little

basis to know how much additional safety is required *ex ante*. Cf. Restatement (Third) of Torts: Products Liability § 2, cmt. a. If the mere existence of knowledge that a product could be made safer is by itself sufficient to give notice that punitive damages may be imposed, then potential defendants are always exposed arbitrarily to punitive damages, no matter how carefully they act. In addition, the Court of Appeal further erred in holding that it would be reversible error even to consider comparable rollover statistics and in positing that industry standards are irrelevant to the analysis.

Such an approach also stands to create significant asymmetry in the assessment of punitive damages. In many jurisdictions, *violations* of government standards already serve as a predicate for the imposition of punitive damages. See, *e.g.*, *Averitt* v. *Southland Motor Inn of Okla.*, 720 F.2d 1178, 1182-83 (10th Cir. 1983) (punitive damages justified where defendant violated health department regulations); *Aldworth Co.* v. *England*, 648 S.E.2d 198, 201 (Ga. Ct. App. 2007) (defendant's violation of federal trucking regulation supported punitive damages); *Wise* v. *Broadway*, 433 S.E.2d 857, 859 (S.C. 1993) (punitive damages may be submitted to the jury where evidence of a statutory violation exists); *Trotter* v. *B&W Cartage Co.*, No. 05-cv-0205-MJR, 2006 WL 1004882, at *8-9 & n.1 (S.D. Ill. Apr. 13, 2006) (collecting cases where punitive damages issues were submitted to juries based on violation of regulatory standards). Against this backdrop, it stands to reason that *compliance* with such standards should provide potential defendants with reasonable assurance that their conduct would not trigger the imposition of punitive damages. At a minimum, compliance with such standards must be considered

to be relevant to whether punitive damages can be imposed. Yet, under the decision of the court below, a defendant would have no more and no less notice that it might be found liable for punitive damages irrespective of the objective lawfulness of its actions.

* * * *

This Court's immediate review is important for resolving the confusion below. In recent years, this Court has done much to bring clarity to punitive damages law, particularly with respect to how severe a punitive damage award may be imposed if a jury finds such damages appropriate. As the petition and the foregoing discussion make plain, however, defendants continue to face great unpredictability as to *when* they may be liable in the first instance for punitive damages. This continued uncertainty is unacceptable. As Justice O'Connor recognized more than a decade ago, "[a]s little as 30 years ago, punitive damages awards were 'rarely assessed,'" but their frequency has "skyrocket[ed]." *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 500-01 (1993) (O'Connor, J., dissenting). Despite the proliferation, as here, "many courts continue to provide jurors with skeletal guidance" about when punitive damages are appropriate. *Id.* Thus, defendants may be left without fair notice that their conduct—even when compliant with federal or other regulatory standards—can expose them to punishment. Only this Court's review can properly cabin punitive damages in line with the fundamental protections of due process.

CONCLUSION

For these reasons, and those stated by petitioner, this Court should grant the petition for certiorari.

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In the Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to The California Court of Appeal

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 103 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in every major facet of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 850 briefs as *amicus curiae* in both state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.[1]

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

As part of the regular product-design process, PLAC's corporate members must routinely analyze and resolve questions about safety. PLAC members who manufacture products with the potential to cause serious physical injury or death—including pharmaceuticals, medical devices, pesticides, foodstuffs, chemicals, appliances, power tools, and automobiles—have a particular interest in the legal ramifications of product-design decisions.

By imposing punitive liability against a manufacturer without requiring any assessment of whether its conduct was objectively reasonable, the California courts have embraced a regime of *post hoc* second guessing that would deprive any manufacturer of the ability to know in advance whether its decisions will subject it to punishment. Such an approach not only deprives manufacturers of "fair notice * * * of the conduct that will subject [them] to punishment" (*BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996)) but also "'mak[es] the law so arbitrary that [manufacturers] will be unable to avoid punishment based solely upon bias or whim'" (*State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003) (quoting *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting))).

When punitive damages are imposed for objectively reasonable conduct, their assessment is divorced from their constitutionally-authorized purpose. It is particularly important to PLAC's members that the law provide clear guidance on how manufacturers can avoid the imposition of punitive liability.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a $55 million punitive damages award attributable to the design decisions of petitioner Ford Motor Company ("Ford"). Notwithstanding the magnitude of the award, when Ford made its design decisions, it had no reason to believe that those decisions would subject it to *any* liability whatever. Nonetheless, the California courts concluded that Ford could be mulcted for punitive damages without regard to whether its design decisions were objectively reasonable. The ramifications of this *post hoc* approach to the imposition of punitive damages are chilling.

The rationale underlying a punitive award presupposes that the defendant could have—and should have—conformed its conduct to society's expectations but strayed so far from its responsibilities that a sanction of a quasi-criminal magnitude is required. The imposition of punitive damages for objectively reasonable conduct unhinges punitive liability from these purposes and implicates the Constitution in two respects. *First*, it squarely breaches the due process imperative of fair notice. If a design decision may subject a manufacturer to punitive liability notwithstanding the existence of objective indicia that the design decision was reasonable, then the manufacturer could not have been on notice that it was committing sanctionable misconduct. *Second*, this approach runs afoul of the due process proscription against arbitrary punishments. Due process requires procedures to "cabin the jury's discretionary authority" (*Philip Morris USA* v. *Williams*, 549 U.S. 346, 352 (2007)) to impose liability for punitive damages every bit as much as it requires procedures to

limit the jury's discretion regarding the amount of punishment. When a jury imposes punitive damages for conduct that an objective observer could have deemed lawful, the result is arbitrariness—the proverbial bolt from the blue.

In the product liability context, the consequences of unpredictable and arbitrary punitive awards can be severe. Past punitive awards create powerful—if often irrational—incentives for manufacturers attempting to design products in similar situations. Safety-related decisions should be made on the merits of competing designs and not the fear that juries will, out of sympathy for a badly injured plaintiff or misplaced anger against a large corporation, levy massive punitive exactions without regard to whether the manufacturer had an objectively reasonable basis for its design decision. To avoid the deleterious consequences of overdeterrence and ensure that manufacturers are afforded their due process rights to fair notice and protection against arbitrary deprivations of property, this Court should grant review and hold that punitive damages cannot be imposed upon a manufacturer whose design decision was objectively reasonable.

A. The Product-Design Process Necessarily Requires Manufacturers To Make Complex Cost-Benefit Decisions About Proposed Design Features.

No product is completely safe. Nor does tort law require manufacturers to build the safest product that money can buy. Thus, airplanes are not constructed entirely from the materials that comprise the indestructible "black box," subway trains are designed to permit standees when sitting might be safer, and automobiles are not equipped with a NAS-

CAR-style roll cage. The process of product design necessarily involves complex cost-benefit decisions. When contemplating a particular design feature, a manufacturer must consider many factors: the risks that are present in the design (including their likelihood and severity), the risks present in alternative designs, and the relative costs and benefits of the feature with respect to other design considerations such as performance, efficiency, marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and costs to consumers. The task of a responsible manufacturer is to strike a reasonable balance between these often countervailing interests.

Of course, the result of this complex cost-benefit analysis can be affected by externalities. Sometimes, statutory and regulatory requirements—developed in daylight with public input and debate—can alter a manufacturer's independent judgment.

Similarly, the threat of punitive damages can skew the design judgments of even the most conscientious manufacturers. Put simply, when punitive damages are awarded for a defective product design, they have the purpose and effect of deterring other manufacturers from making similar design decisions. This may be appropriate in some circumstances, but when manufacturers are left to guess what decisions may be subjected to quasi-criminal condemnation and sanctions, the result is a scattershot of design deviations based on no effective policy foundation.

B. The Imposition Of Punitive Liability In This Case Will Have An Irrational And Dangerous Impact On The Product-Design Process.

In this case, there was no way for Ford to know that it risked punitive liability when it made its design decisions. It complied with the standard on roof strength (FMVSS 216, 49 C.F.R. § 571.216) set by the National Highway Traffic Safety Administration ("NHTSA"), whose experts believed that vehicles with roofs designed to meet the standard were reasonably safe. Likewise, NHTSA considered and *rejected* the roll-over stability standards relied upon by plaintiffs' experts after the fact. Pet. 4.

When the Explorer was designed, Ford's engineers faced an inevitable dilemma in determining the center of gravity: A high center of gravity increases the risk of injuries caused by rollovers, while a low center of gravity increases the risks of injuries from head-on collisions. See, *e.g.*, Ford's Ct. App. Br. 47–48. Likewise, experts disagreed about how to measure vehicle stability. *Id.* at 47–49. The existence of these genuine ongoing disputes among experts over the merits of the disputed "safety features" colors the nature of Ford's design decision in this case. Ford had to analyze competing expert opinions on the fundamental safety-related merits of various design features. There was no consensus about whether certain alternatives created an unreasonable risk. Indeed, with respect to the Explorer's center of gravity, there was no consensus about how to balance the tradeoff between rollover risk (with its high severity but low probability) and head-on risk (with relatively lower severity but higher probability) in crafting a safe vehicle overall. Ford's ultimate de-

cision was based on its attempt to strike a reasonable balance between all of the diverse factors discussed above. In other words, the design decision involved in this case was not simply a question of dollars and cents versus safety but involved a fundamental controversy about the relative safety of different product designs.

We take no position on the merits of these competing viewpoints or whether Ford's ultimate decision was correct in hindsight. Those are questions that are appropriately resolved by a factfinder when deciding whether to award *compensatory* damages. Nor do we take a position on the more complicated question of when a design decision that straightforwardly chooses costs over known safety risks should give rise to punitive liability. Instead, our point is that, contrary to plaintiffs' theory of the case, punitive liability is never appropriate when, at the time that design decisions were being made, there was an objectively reasonable basis for making the decision—and no reason to believe that it would be subjected to punitive sanctions.

C. This Court Should Grant Review To Confirm That The Due Process Clause Prohibits States From Imposing Punitive Damages On A Product Manufacturer For Conduct That Reasonable Persons Could Have Concluded Was Lawful.

This Court repeatedly has stated that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice * * * of the severity of the penalty that a State may impose'" and "threaten 'arbitrary punishments,' *i.e.*,

punishments that reflect not an 'application of law' but 'a decisionmaker's caprice.'" *Philip Morris*, 549 U.S. at 352. Accordingly, "this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'" *Id.* at 353. By the same logic, a State that fails to cabin the jury's discretion deprives a defendant of fair notice of the conduct that will expose the defendant to punitive liability in the first place.

Both the requirement of "fair notice" and the limitation on "arbitrary punishments" are implicated when California courts sustain punitive liability without regard to whether the defendant had an objectively reasonable basis for believing that its conduct was permissible.

1. "[T]he concept of fair notice is [the] bedrock of any * * * procedure." *Lankford* v. *Idaho*, 500 U.S. 110, 120–121 (1991). As this Court has explained, "the point of due process—of the law in general—is to allow citizens to order their behavior." *State Farm*, 538 U.S. at 418 (internal quotation marks omitted). It follows inexorably that an unpredictable sanction does not permit a party to order its behavior and therefore violates due process. Accordingly, "[e]lementary notions of fairness enshrined in [this Court's] jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment." *BMW*, 517 U.S. at 574; see also *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402–403 (1966) ("a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits").

Punitive damages can violate this principle in two ways. A statute that is vague on its face makes it impossible for *any* defendant to predict what conduct will be penalized. Alternatively, the circumstances of a particular case can render punitive damages unpredictable such that the governing statute is vague as applied. Both concerns are particularly potent in the product-liability context. Tort law expects manufacturers to make risk-utility assessments of design proposals. If they cannot adequately anticipate the risk of punitive damages, however, those calculations will be less likely to maximize either utility or public safety.

As one commentator has observed, in the product-liability context an award of punitive damages can give rise to "'indirect' costs that manufacturers appear to take very seriously, such as publicity about litigation that may damage the company's reputation or trigger additional lawsuits, reactions of consumers that could reduce product demand, and reactions of safety regulators such as investigations, product recalls, or stricter regulations." Steven Garber, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis: A Problem Without a Solution?*, 52 STAN. L. REV. 1809, 1814 (2000); see also *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting) ("[T]here is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake. This factor militates in favor of strong procedural safeguards."); *Masaki* v. *Gen. Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989) (punitive damages "can stigmatize the defendant in much the same way as a criminal conviction" and therefore "can be onerous when loosely assessed").

Sensitive to these concerns, several courts have held as a matter of state law that punitive liability is inappropriate when the manufacturer has made a design decision that was supported by contemporaneous expert opinion—such that an objective observer could have concluded that the decision was reasonable—even though other experts might have believed that the design created an unreasonable risk of injury.[2]

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[2] See, *e.g.*, *Satcher* v. *Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating punitive award in part because "there is a genuine dispute in the scientific community as to whether leg guards do more harm than good"); *Burke* v. *Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993) (reversing denial of j.n.o.v. because "[a]n award of punitive damages is not appropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct at issue"); *Loitz* v. *Remington Arms Co.*, 563 N.E.2d 397, 407 (Ill. 1990) (reversing punitive award in part because there was a good-faith disagreement among metallurgical experts regarding the safety of the material used in making the gun barrel that exploded, causing plaintiff's injury); *Mercer* v. *Pittway Corp.*, 616 N.W.2d 602, 618 (Iowa 2000) (concluding that, where there was reasonable disagreement among experts about adequacy of product design and testing, rational jury could not find defendant liable for punitive damages even though it could reasonably find liability on plaintiffs' underlying tort claims); *Hillrichs* v. *Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) (affirming j.n.o.v. on punitive damages because "an award of punitive damages is inappropriate where room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue"); *Owens-Corning Fiberglas Corp.* v. *Garrett*, 682 A.2d 1143, 1163–1165, 1167–1168 (Md. 1996) (reversing punitive award in part because there was a genuine scientific dispute regarding the safety of the product at issue); see generally David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 38 (1982).

Likewise, in equivalent contexts, this Court has recognized that due process precludes the imposition of punishment whenever the defendant reasonably could have concluded that its conduct was lawful. *See generally Colautti* v. *Franklin*, 439 U.S. 379, 401 (1979) (finding criminal statute predicating liability on a "complex medical judgment about which experts can—and do—disagree" to be unconstitutionally vague); *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 392 (1926) (criminal law "should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another"); *Sw. Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482, 490 (1915). Nevertheless, the court below specifically refused to consider whether punitive liability could coexist with the objectively reasonable belief that the design decision was correct.

This case accordingly exemplifies the need for this Court to clarify that the fair notice component of due process—not just state law—precludes imposition of punitive damages when the record contains objective indicia of the reasonableness of the defendant's conduct.

2. This Court's oft-expressed concern about arbitrary punishments further supports the need for review. For a variety of reasons, product liability cases pose significant and persistent risks that punitive damages will be imposed arbitrarily. *First*, such cases frequently involve catastrophic injury or death. *Second*, many products—no matter how well-designed—carry unavoidable risks. *Third*, the design process necessarily involves attempts to identify and balance risks. Thus, manufacturers are particularly susceptible to findings of punitive liability by

juries that are exhorted to conflate intent to design a product in a certain way with intent to injure.[3]

Serious injuries viewed through the lens of hindsight can result in serious penalties that have no power to deter future misconduct.

As Judge Easterbrook has explained:

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. Engineers design [complex products] to minimize the sum of construction, operation, and injury costs. * * *
>
> Come the lawsuit, however, the [plaintiff] injured by [the product] presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured [by an alternative design] are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. * * * [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by [consumers] (and stockholders) in other states.

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[3] Design defect cases inevitably involve "'conscious design choice[s]' * * * implicat[ing] a manufacturer's decisionmaking process concerning risk-utility"; "[u]nlike the standard negligence case of yesteryear, the modern products liability case comes with 'intent' built in." Aaron D. Twerski, *Punitive Damages: Through the Five Prisms*, 39 VILL. L. REV. 353, 356 (1994); see also Owen, *supra* note 2, at 22–26.

Carroll v. *Otis Elevator Co.*, 896 F.2d 210, 215–216 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted); see also W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 116 (2001).

The arbitrary nature of punitive damages in the product liability context is at its zenith when such damages are imposed in the face of objective evidence of the reasonableness of the design decision—such as evidence that the decision complied with NHTSA standards or evidence of a legitimate, good-faith dispute among experts over the best way to balance risk against functionality. If punitive damages are permitted in such circumstances, there is no way (other than building a fortress on wheels) for the manufacturer to protect itself from punitive damages. That is the height of arbitrariness. For this reason as well, review is warranted to make clear that the Due Process Clause prohibits the imposition of punitive damages when the defendant had an objective basis for believing its conduct to be permissible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

Corporate Members of the Product Liability Advisory Council

3M
A.O. Smith Corporation
ACCO Brands Corporation
Altec Industries
Altria Client Services Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire North America, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. DuPont De Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.

Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Genentech, Inc.
General Electric Company
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Newell Rubbermaid Inc.
Nintendo of America, Inc.

Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Senco Products, Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.